CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 35 SEPTEMBER 5, 2001 NO. 36

This issue contains:

U.S. Customs Service
T.D. 01–57 Through 01–60
General Notices
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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 01–57)

RECORDATION OF TRADE NAME:
"RED BULL GMBH"

AGENY: Customs Service, Treasury.

ACTION: Notice of final action.

SUMMARY: This document gives notice that "RED BULL GMBH" is recorded by Customs as the trade name for Red Bull GmbH, an Austrian corporation organized under the laws of the State of Salzburg located at Brunn 115, A–5330 Fuschl am See, Oesterreich, Austria.

EFFECTIVE DATE: August 23, 2001.

FOR FURTHER INFORMATION CONTACT: Gwendolyn Savoy, Intellectual Property Rights Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Ave., N.W., Suite 3.4A, Washington, D.C. 20229; (202) 927–2330.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Trade names adopted by business entities may be recorded with Customs to afford the particular business entity with increased commercial protection. Customs procedure for recording trade names is provided at § 133.12 of the Customs Regulations (19 CFR 133.12). Pursuant to this regulatory provision, the Red Bull GmbH, an Austrian corporation organized under the laws of the State of Salzburg, and located at Brunn 115, A–5330 Fuschl am See, Oesterreich, Austria, applied to Customs for protection of its trade name "RED BULL GMBH".

On Thursday, June 14, 2001, Customs published a notice of application for the recordation of the trade name "RED BULL GMBH" in the Federal Register (66 FR 32414). The application advised that before final action would be taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name and received not later than August 13, 2001.

The comment period closed August 13, 2001. No comments were received during the comment period. Accordingly, as provided by § 133.12, of the Customs Regulations, "RED BULL GMBH" is recorded with Customs as the trade name used by Red Bull GmbH, and will remain in force as long as this trade name is used by this corporation, unless other action is required.

The trade name is used on a product called Red Bull Energy Drink and Point of Sale and other promotional materials for Red Bull Energy Drink. The merchandise is manufactured in Austria.

Dated: August 17, 2001.

JOANNE ROMAN STUMP,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, August 23, 2001 (66 FR 44440)]

(T.D. 01–58)

RECORDATION OF TRADE NAME: "RED BULL NORTH AMERICA INC."

AGENY: Customs Service, Treasury.

ACTION: Notice of final action.

SUMMARY: This document gives notice that "RED BULL NORTH AMERICA, INC." is recorded by Customs as the trade name for Red Bull GmbH, an Austrian corporation organized under the laws of the State of Salzburg located at Brunn 115, A–5330 Fuschl am See, Oesterreich, Austria.

EFFECTIVE DATE: August 23, 2001.

FOR FURTHER INFORMATION CONTACT: Gwendolyn Savoy, Intellectual Property Rights Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Ave., N.W., Suite 3.4A, Washington, D.C. 20229; (202) 927–2330.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Trade names adopted by business entities may be recorded with Customs to afford the particular business entity with increased commercial protection. Customs procedure for recording trade names is provided at § 133.12 of the Customs Regulations (19 CFR 133.12). Pursuant to this regulatory provision, the Red Bull GmbH, an Austrian corporation or-

ganized under the laws of the State of Salzburg, and located at Brunn 115, A–5330 Fuschl am See, Oesterreich, Austria, applied to Customs for protection of its trade name "RED BULL NORTH AMERICA, INC".

On Thursday, June 14, 2001, Customs published a notice of application for the recordation of the trade name "RED BULL NORTH AMERICA, INC." in the Federal Register (66 FR 32414). The application advised that before final action would be taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name and received not later than August 13, 2001.

On Thursday, July 12, 2001, Customs published a correction of publication in the Federal Register (66 FR 36617), of the June 14, 2001, notification to record a trade name because part of the corporation's full trade name was erroneously omitted (i.e., NORTH AMERICA, INC.).

The comment period closed August 13, 2001. No comments were received during the comment period. Accordingly, as provided by § 133.12 of the Customs Regulations, "RED BULL NORTH AMERICA, INC." is recorded with Customs as the trade name used by Red Bull GmbH, and will remain in force as long as this trade name is used by this corporation, unless other action is required.

The trade name is used on a product called Red Bull Energy Drink and point of sale and other promotional materials for Red Bull Energy Drink. The merchandise is manufactured in Austria.

Dated: August 17, 2001.

JOANNE ROMAN STUMP,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, August 23, 2001 (66 FR 44440)]

(T.D. 01–59)

SYNOPSES OF DRAWBACK RULINGS

The following are synopses of drawback rulings approved April 2, 1998, to April 13, 2001, inclusive, pursuant to Subparts A & B, Part 191 of the Customs Regulations.

In the synopses below are listed for each drawback ruling approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded to or approved by, the date on which it was approved and the ruling number.

Dated: August 20, 2001.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Akzo Nobel Polymer Chemicals LLC
Articles: MC M1, MC 101, MC 105, MC 118, MC GF2A, and MC GF2A/1 Catalysts
Merchandise: tradenames: MS M1, MS 101, MS L2, MS 118, and MS GF2A SUPPORTS
Application signed: October 10, 2000
Ruling Forwarded to PD of Customs: New York, April 4, 2001
Effect on ot ıer rulings: none
Ruling: 44–06094–000

(B) Company: Avecia Inc. (successor to Zeneca Inc. under 19 U.S.C. 1313(s))
Articles: reagents (Acorga M5397; Acorga M5640; Acorga M5774; Acorga M5850; Acorga PT5050; Acorga PT5050MD; Acorga M5640HS)
Merchandise: hydroxyl amine sulfate; paraformaldehyde
Application signed: October 12, 1999
Ruling Forwarded to PD of Customs: New York, February 9, 2001
Effect on other rulings: none
Ruling: 44–06065–000

(C) Company: Bracco Diagnostics, Inc.
Articles: ISOVUE®
Merchandise: iopamidol
Application signed: January 25, 2001
Ruling Forwarded to PD of Customs: Houston, April 13, 2001
Effect on other rulings: none
Ruling: 44–06071–000

(D) Company: CII Carbon, LLC
Articles: not modified
Merchandise: not modified
Supplemental application signed: March 31, 1998
Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, April 2, 1998
Effect on other rulings: Revokes T.D. 96–62–E (44–04714–000) to cover successorship from Calciner Industries, Inc.
Ruling: 44–04714–001

(E) Company: Cincinnati Specialties, LLC
Articles: o-Carbomethoxybenzene sulfonamide, crude and finished a/k/a OCBS–M
Merchandise: insoluble saccharin (SDI)
Application signed: November 8, 2000
Ruling Forwarded to PD of Customs: New York, March 13, 2001
Effect on other rulings: successor to Cincinnati Specialties, Inc. T.D. 99–66–J (44–05748–000) under 19 U.S.C. 1313(s)
Ruling: 44–05748–001

(F) Company: Crompton Corp.
Articles: not modified
Merchandise: not modified
Supplemental application signed: August 7, 2000
Ruling Forwarded to PD of Customs: Boston, February 9, 2001
Effect on other rulings: successor to OSi Specialties, Inc. T.D. 96–86–T (44–04814–000) under 19 U.S.C. 1313(s)
Ruling: 44–04814–001

(G) Company: Crompton Corp.
Articles: not modified
Merchandise: not modified
Supplemental application signed: August 7, 2000
Ruling Forwarded to PD of Customs: Boston, February 9, 2001
Effect on other rulings: successor to OSi Specialties, Inc. T.D. 96–86–U (44–04813–000) under 19 U.S.C. 1313(s)
Ruling: 44–04813–001

(H) Company: Cytec Industries, Inc.
Articles: CYASORB UV–5411 LIGHT ABSORBER
Merchandise: ortho-nitroaniline
Application signed: October 30, 2000
Ruling Forwarded to PD of Customs: New York, February 9, 2001
Effect on other rulings: none
Ruling: 44–06066–000

(I) Company: Cytec Industries, Inc.
Articles: CYASORB UV–3529 light stabilizer
Merchandise: bis piperidine (BPIP); cyanuric chloride (crystalline); paraformaldehyde
Application signed: January 17, 2001
Ruling Forwarded to PD of Customs: New York, March 7, 2001
Effect on other rulings: none
Ruling: 44–06075–000

(J) Company: Dow AgroSciences LLC (successor to DowElanco under 19 U.S.C. 1313(s))
Articles: DE–570 (Florasulam)
Merchandise: 2,2′-dithiobis (8-fluoro-5-methoxy[1,2,4]triazolo[1,5-c] pyrimidine (DMDS)
Application signed: August 2, 2000
Ruling Forwarded to PD of Customs: Boston, San Francisco & Houston, March 12, 2001
Effect on other rulings: none
Ruling: 44–06076–000

(K) Company: E.I. DuPont De Nemours and Co.
Articles: Ti-Pure (titanium dioxide pigments)
Merchandise: titanium ores and concentrates; rutile (synthetic and natural); titania slag
Application signed: December 3, 1991 as revised March 7, 1994
Ruling Forwarded to PD of Customs: New York & Boston, March 5, 2001
Effect on other rulings: none
Ruling: 44–06157–000

(L) Company: ESCO Company, a limited partnership
Articles: Thermal colorformers
Merchandise: 2-methyl-4-methoxy-diphenylamine (DPA); DBMap-Ketoacid; meta-cresol (m-cresol)
Application signed: August 30, 2000
Ruling Forwarded to PD of Customs: Houston, March 16, 2001
Effect on other rulings: terminates T.D. 99–28–E (44–05454–000)
Ruling: 44–05454–001

(M) Company: General Electric Company
Articles: Lexan® polycarbonate resin
Merchandise: bisphenol–A (BPA)
Application signed: January 16, 2001
Ruling Forwarded to PD of Customs: New York, March 20, 2001
Effect on other rulings: none
Ruling: 44–06078–000

(N) Company: GE Plastics Mt. Vernon, Inc.
Articles: Lexan® resin; VALOX® resin; CYCOLOY® resin
Merchandise: TSAN
Application signed: March 5, 2001
Ruling Forwarded to PD of Customs: New York, April 6, 2001
Effect on other rulings: none
Ruling: 44–06093–000

(O) Company: Goodyear Tire & Rubber Company
Articles: automotive and industrial belts
Merchandise: polyester yarn or cord, Type 1X53
Application signed: November 30, 2000
Ruling Forwarded to PDs of Customs: New York, March 28, 2001
Effect on other rulings: none
Ruling: 44–06088–000

(P) Company: Haarmann & Reimer, a general partnership
Articles: benzyl acetate; benzyl benzoate
Merchandise: benzyl alcohol
Application signed: July 31, 2000
Ruling Forwarded to PD of Customs: New York, February 22, 2001
Effect on other rulings: successor to Haarmann & Reimer Corp. T.D. 95–85–P (44–04353–000) under 19 U.S.C. 1313(s)
Ruling: 44–04353–001

(Q) Company: Haarmann & Reimer, a general partnership
Articles: DL-menthol; L-menthol; RC-menthol, D-menthol, DL-isomenthol fraction; DL-neomenthol
Merchandise: intermediates for menthol: isomeric menthol; crude menthol; L-menthol distilled; racemic menthol, DL-menthol
Application signed: July 31, 2000
Ruling Forwarded to PD of Customs: New York, March 22, 2001
Effect on other rulings: successor to Haarmann & Reimer Corp. T.D. 87–101–G (44–02449–000) under 19 U.S.C. 1313(s)
Ruling: 44–02449–001

(R) Company: Konica Graphic Imaging International, Inc.
Articles: coated photographic paper and coated photographic film (master rolls, standard rolls and sheets)
Merchandise: dyes; chemicals; chemical products; film bases; gelatins; silver halide emulsions; coated photographic film (bulk rolls)
Application signed: May 11, 2000
Ruling forwarded to PD of Customs: New York, March 9, 2001
Effect on other rulings: none
Ruling: 44–06072–000

(S) Company: Lyondell Chemical Worldwide, Inc.
Articles: not modified
Merchandise: not modified
Supplemental Application Signed: October 1, 1999
Modification approved by Port Director of Customs in accordance with §191.8(g)(2): Houston, June 13, 2000
Effect on other rulings: modifies T.D. 97–87–D; 44–03928–001 to cover change in company name from ARCO Chemical Company
Ruling: 44–03928–002

(T) Company: Lyondell Chemical Worldwide, Inc.
Articles: not modified
Merchandise: not modified
Supplemental Application signed: October 1, 1999
Modification approved by Port Director of Customs in accordance with §191.8(g)(2): Houston, June 13, 2000
Effect on other rulings: modifies T.D. 97–54–D; 44–00148–001 to cover change in company from ARCO Chemical Company
Ruling: 44–00148–002

(U) Company: Merck & Co., Inc.
Articles: Imipenem sterile; Imipenem milled sterile; Imipenem/Cilastatin blend, bulk powder; Imipenem/Cilastatin blend, dosage vials a/k/a PRIMAXIN® and TIENAM®
Merchandise: bis (2,4 dichlorophenyl) chlorophosphate
Application signed: November 9, 2000
Ruling forwarded to PD of Customs: New York, March 20, 2001
Effect on other rulings: none
Ruling: 44–06079–000

(V) Company: QST Industries, Inc.
Articles: chancellor T–10 woven fabric
Merchandise: greige piece goods
Application signed: July 14, 2000
Ruling forwarded to PD of Customs: New York, March 21, 2001
Effect on other rulings: none
Ruling: 44–06080–000

(W) Company: QST Industries, Inc.
Articles: chancellor T–20 woven fabric
Merchandise: greige piece goods
Application signed: July 14, 2000
Ruling forwarded to PD of Customs: New York, February 9, 2001
Effect on other rulings: none
Ruling: 44–06067–000

(X) Company: Saint-Gobain Performance Plastics Corporation
Articles: Korton PFA, FEP etched films; Korton PFA tubing; Korton FEP tubing
Merchandise: Neoflon PFA 230; Neoflon FEP 20; Neoflon FEP 40 resins
Application signed: May 3, 2000
Ruling forwarded to PD of Customs: New York, March 28, 2001
Effect on other rulings: successor to Norton Performance Plastics Corporation, T.D. 00–42–Q (44–02975–001) under 19 U.S.C. 1313(s)
Ruling: 44–02975–002

(Y) Company: SpecialtyChem Products Corp.
Articles: 1,4-dimethoxybenzene (DMB) a/k/a para-dimethoxybenzene a/k/a hydroquinone dimethyl ether; 4-methoxyphenol (HA) a/k/a p-hydroxyanisole a/k/a monomethyl ether of hydroquinone (MEHQ)
Merchandise: hydroquinone
Application signed: August 10, 2000
Ruling Forwarded to PD of Customs: New York, April 12, 2001
Effect on other rulings: terminates T.D. 89–81–X
Ruling: 44–06096–000

(Z) Company: VanDeMark, Inc.
Articles: para-toluene sulfonyl isocyanate finished
Merchandise: para-toluene sulfonamide
Application signed: October 31, 2000
Ruling Forwarded to PD of Customs: New York, March 8, 2001
Effect on other rulings: successor to Vanchem Inc., T.D. 93–86–Y (44–03713–000) under 19 U.S.C. 1313(s)
Ruling: 44–03713–001

(T.D. 01–60)

CUSTOMS ACCREDITATION AND APPROVAL OF NATIONAL MARINE CONSULTANTS INCORPORATED AS A COMMERCIAL LABORATORY AND COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Accreditation and Approval of National Marine Consultants, Inc. of Matawan, New Jersey as a Commercial Laboratory and Commercial Gauger.

SUMMARY: National Marine Consultants, Inc. of Matawan, New Jersey, has applied to U.S. Customs under Parts 151.12 and 151.13 of the Customs Regulations for accreditation as a commercial laboratory to analyze petroleum products under Chapter 27 and Chapter 29 of the Harmonized Tariff Schedule of the United States (HTSUS) and approval as a commercial gauger to gauge petroleum products under Chapter 27 and Chapter 29, animal and vegetable oils under Chapter 15 and organic compounds under Chapter 29 of the Harmonized Tariff Schedule of the United States (HTSUS). Customs has determined that this company meets all of the requirements for accreditation as a commercial laboratory and approval as a commercial gauger. Specifically, National Marine Consultants, Inc. has been granted laboratory accreditation to perform the following test methods at their Thorofare, New Jersey site: (1) API Gravity, ASTM D 287 & ASTM D 1298; (2) Sediment, ATSM D 473 & ASTM D 95; (3) Distillation, ASTM D 86; (4) Saybolt Universal Viscosity, ASTM D 445; (5) Percent by weight of Sulfur, ASTM D 4294. Additionally, National Marine Consultants, Inc. has been granted approval to gauge petroleum products under Chapter 27 and Chapter 29, animal and vegetable oils under Chapter 15 and organic compounds under Chapter 29 of the Harmonized Tariff Schedule of the United States (HTSUS). Therefore, in accordance with Parts 151.12 and 151.13 of the Customs Regulations, National Marine Consultants, Inc. is hereby accredited to analyze and approved to gauge the products named above.

LOCATION: National Marine Consultants, Inc. accredited and approved site is located at: 650 Grove Road, Suite 111, Thorofare, New Jersey 08086.

EFFECTIVE DATE: August 13, 2001

FOR FURTHER INFORMATION CONTACT: Michael Parker, National Quality Manager, Laboratories and Scientific Services, U.S. Customs Service, 1300 Pennsylvania Avenue, NW, Suite 1500 North, Washington, D.C. 20229, (202) 927–1060.

Dated: August 20, 2001.

IRA S. REESE,
Acting Executive Director,
Laboratories and Scientific Services.

[Published in the Federal Register, August 27, 2001 (66 FR 45077)]

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 8–2001)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of July 2001. The last notice was published in the CUSTOMS BULLETIN on August 8, 2001.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1300 Pennsylvania Avenue, N.W., Ronald Reagan Building, 3rd floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Joanne Roman Stump, Chief, Intellectual Property Rights Branch, (202) 927–2330.

Dated: August 16, 2001.

JOANNE ROMAN STUMP,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

08/01/01 U.S. CUSTOMS SERVICE PAGE 1
14:46:01 IPR RECORDATIONS ADDED IN JULY 2001 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNN OR MSK	OWNER NAME	RE
COP0100065	20010706	20210706	LAMP IN THE SHAPE OF A SEAL	SEHL PRODUCTIONS INC.	N
COP0100066	20010706	20200706	HANNA-BARBERA CLASSICS STYLE GUIDE	HANNA-BARBERA PRODUCTIONS INC.	N
COP0100067	20010706	20200706	SD GUNDAM BB-SENSHI PLASTIC MODEL KITS CATALOGUE	SUNRISE INC.	N
COP0100068	20010706	20200706	"MAXIMUM" MOUSE	ERIC MILES FUQUA	N
COP0100069	20010706	20210706	"MICK" THE KOALA	ERIC MILES FUQUA	N
COP0100070	20010706	20200706	"SPANKY" THE MONKEY	ERIC MILES FUQUA	N
COP0100071	20010706	20200706	"SLOWPOKE" THE TURTLE	ERIC MILES FUQUA	N
COP0100072	20010706	20200706	"WOODY" THE DOG	ERIC MILES FUQUA	N
COP0100073	20010706	20200706	"MORTY" THE MOOSE	ERIC MILES FUQUA	N
COP0100074	20010706	20200706	"DOMINGO" THE FLAMINGO	ERIC MILES FUQUA	N
COP0100075	20010706	20200706	"ICE PUBE" THE POLAR BEAR	ERIC MILES FUQUA	N
COP0100076	20010706	20200706	"RANDY" THE RACCOON	ERIC MILES FUQUA	N
COP0100077	20010706	20200706	"QUICKIE" THE JACKRABBIT	ERIC MILES FUQUA	N
COP0100078	20010706	20200706	"CHUBBY" THE BLACK BEAR	ERIC MILES FUQUA	N
COP0100079	20010706	20200706	"PEPE" THE PIG	ERIC MILES FUQUA	N
COP0100080	20010706	20200706	"DING-A-LING-LING" THE PANDA	ERIC MILES FUQUA	N
COP0100081	20010706	20210706	YUMMY CHOICE PACKAGING DESIGN-ASSORTED TUB 10 DESIGNS	21 CENTURY SNACK KING USA LLC	N
COP0100082	20010706	20210706	YUMMY CHOICE PACKAGING DESIGN-ASSORTED BAGS 10 DESIGNS	21 CENTURY SNACK KING USA LLC	N
COP0100083	20010716	20200716	MISS PIGGY	THE JIM HENSON COMPANY	N
COP0100084	20010716	20210716	KERMIT	THE JIM HENSON COMPANY	N
COP0100085	20010716	20210716	ANIMAL	THE JIM HENSON COMPANY	N
COP0100086	20010716	20210716	GONZO	THE JIM HENSON COMPANY	N
COP0100087	20010716	20210716	ROWLF	THE JIM HENSON COMPANY	N
COP0100088	20010716	20210716	RED	THE JIM HENSON COMPANY	N
COP0100089	20010716	20210716	FOZZIE BEAR	THE JIM HENSON COMPANY	N
COP0100090	20010716	20210716	MOKEY	THE JIM HENSON COMPANY	N
COP0100091	20010716	20210716	GOBO	THE JIM HENSON COMPANY	N
COP0100092	20010716	20210716	WEMBLEY	THE JIM HENSON COMPANY	N
COP0100093	20010716	20210716	BOOBER	THE JIM HENSON COMPANY	N
SUBTOTAL RECORDATION TYPE		29			
TMK0100275	20010705	20070311	CONFIGURATION OF A GUITAR (UPPER BODY SHAPE)	PAUL REED SMITH GUITARS	N
TMK0100276	20010705	20081018	CONFIGURATION OF THE BODY SHAPE OF GUITARS AND BASSES	PAUL REED SMITH GUITARS	N
TMK0100277	20010705	20060121	FANCIFUL BIRD DESIGNS ARRANGED ON THE FRETS OF A GUITAR	PAUL REED SMITH GUITARS	N
TMK0100278	20010705	20081011	CONFIGURATION OF HEADSTOCK SHAPE OF A GUITAR	PAUL REED SMITH GUITARS	N
TMK0100279	20010705	20070310	LERNER	LERNCO INC.	N
TMK0100280	20010706	20091121	CACIQUE	LANE BRYANT INC.	N
TMK0100281	20010706	20101127	HARVARD	PRESIDENT AND FOLLOWS OF HARVARD	N
TMK0100282	20010706	20101204	VERITAS AND DESIGN	PRESIDENT AND FOLLOWS OF HARVARD	N
TMK0100283	20010706	20101030	VERITAS AND DESIGN	PRESIDENT AND FOLLOWS OF HARVARD	N
TMK0100284	20010706	20100825	CREAM OF WHEAT	NABISCO BRANDS COMPANY	N
TMK0100285	20010706	20110306	CONFIGURATION OF A CLOTHESLINE SPREADER	PENN PLASTICS INC.	N
TMK0100286	20010706	20101219	CONFIGURATION OF A PULLEY FRAME WITH WHEEL	PENN PLASTICS INC.	N
TMK0100287	20010706	20090323	CONFIGURATION OF A PULLEY FRAME WITH WHEEL	PENN PLASTICS INC.	N
TMK0100288	20010706	20021020	HVC	ACUSHNET COMPANY	N
TMK0100289	20010706	20090822	INTEGRA	ONKYO U.S.A. CORPORATION	N
TMK0100290	20010710	20110324	GINGHAM CLOTH TOP DESIGN	J. M. SMUCKER COMPANY	N
TMK0100291	20010710	20100724	HONDA AND DESIGN (WING)	HONDA GIKEN KOGYO KABUSHIKI KAIS	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0100292	20010710	20100714	HONDA AND DESIGN (WING)	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0100293	20010710	20100724	DESIGN ONLY (WING)	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0100294	20010710	20100102	LEGEND	HONDA GIKEN KOGYO KABUSHIKI KAIS	N
TMK0100295	20010710	20100410	THE COLOR BLUE	PRINGING PRESS EQUIPMENT INC.	N
TMK0100296	20010710	20050101	SUPER BLUE	PRINGING PRESS EQUIPMENT INC.	N
TMK0100297	20010710	20091026	CAMP CREEK	RUSSELL ASSET MANAGEMENT INC.	N
TMK0100298	20010710	20060917	THREE RIVERS	RUSSELL ASSET MANAGEMENT INC.	N
TMK0100299	20010710	20011203	BRIDGEPORT	RUSSELL ASSET MANAGEMENT INC.	N
TMK0100300	20010710	20110120	VICTORIA'S SECRET	V SECRET CATALOGUE INC.	N
TMK0100301	20010710	20041120	RUFFO	RUFFO S.P.A.	N
TMK0100302	20010710	20110313	FRONTRUNNER	MADISON-KIPP CORPORATION	N
TMK0100303	20010710	20030105	BELLAGIO	NUR AHMAD	N
TMK0100304	20010710	20100829	KML	PREMIER BEARING & EQUIPMENT	N
TMK0100305	20010710	20040111	CONFIGURATION OF LIGHTENING BOLTS	EASTMAN MACHINE COMPANY	N
TMK0100306	20010710	20061224	DESIGN MARK	EASTMAN MACHINE COMPANY	N
TMK0100307	20010711	20070211	DESIGN MARK	EASTMAN MACHINE COMPANY	N
TMK0100308	20010711	20101124	PANASONIC	MATSUSHITA ELECTRIC INDUSTRIAL	N
TMK0100309	20010711	20110929	BENJAMIN BUNNY	FREDERICK WARNE & CO., INC.	N
TMK0100310	20010711	20110421	MRS. TIGGY WINKLE	FREDERICK WARNE & COMPANY INC.	N
TMK0100311	20010711	20110714	FLOPSY	FREDERICK WARNE & COMPANY INC.	N
TMK0100312	20010711	20110224	PANDA LOGO	LEE KUM KEE COMPANY LIMITED	N
TMK0100313	20010711	20110414	MR. JEREMY FISHER	FREDERICK WARNE & COMPANY INC.	N
TMK0100314	20010711	20101130	555	ARDATH TOBACCO CO., LTD.	N
TMK0100315	20010711	20100411	DOG LIKENESS	WOLVERINE WORLD WIDE INC.	N
TMK0100316	20010711	20100215	WOLVERINE FUSION	WOLVERINE WORLD WIDE INC.	N
TMK0100317	20010711	20090627	STARBURST	MARS INCORPORATED	N
TMK0100318	20010711	20110714	MILKYWAY	MARS INCORPORATED	N
TMK0100319	20010711	20040507	M & DESIGN	MARS INCORPORATED	N
TMK0100320	20010711	20040326	M & DESIGN	MARS INCORPORATED	N
TMK0100321	20010711	20091121	M & DESIGN	MARS INCORPORATED	N
TMK0100322	20010711	20091121	M & DESIGN	MARS INCORPORATED	N
TMK0100323	20010711	20100424	SNICKERS	MARS INCORPORATED	N
TMK0100324	20010711	20100515	THE MILK CHOCOLATE MELTS IN YOUR MOUTH-NOT IN YOUR	MARS INCORPORATED	N
TMK0100325	20010711	20040607	STARBURST	MARS INCORPORATED	N
TMK0100326	20010711	20090622	MM	MARS INCORPORATED	N
TMK0100327	20010711	20090622	MM	MARS INCORPORATED	N
TMK0100328	20010711	20100522	KUDOS	MARS INCORPORATED	N
TMK0100329	20010711	20090803	DOVE PROMISES AND DESIGN	MARS INCORPORATED	N
TMK0100330	20010711	20090803	DOVE PROMISES AND DESIGN	MARS INCORPORATED	N
TMK0100331	20010711	20090817	PROMISES	MARS INCORPORATED	N
TMK0100332	20010711	20110410	WARRIOR	NEWPORT GOLF CORPORATION	N
TMK0100333	20010711	20090720	DAZER	K-11 ENTERPRISES	N
TMK0100334	20010711	20091207	NO NEW WIRES	INTELLON CORPORATION	N
TMK0100335	20010711	20100417	DONBERRY & KEATS	THE APPAREL GROUP LTD.	N
TMK0100336	20010716	20110519	VISINE A.C.	PFIZER INC.	N
TMK0100337	20010716	20020707	BM	BRUNNER DRILLING & MANUFACTURING	N
TMK0100338	20010716	20020707	BDM	BRUNNER DRILLING & MANUFACTURING	N
TMK0100339	20010716	20050412	SADAF(& DESIGN)	SOOFER CO. INC.	N
TMK0100340	20010717	20090302	TRETORN	TRETORN AKTIEBOLAG	N

08/01/01 U.S. CUSTOMS SERVICE PAGE 3
14:46:01 IPR RECORDATIONS ADDED IN JULY 2001 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0100341	20010717	20100410	NYLITE	TRETORN AKTIEBOLAG	N
TMK0100342	20010717	20010908	HAAGEN-DAZS	HDIP, INC.	N
TMK0100343	20010717	20020803	HAAGEN-DAZS	HDIP, INC.	N
TMK0100344	20010718	20050815	MACROVISION WITH LOGO	MACROVISION CORPORATION	N
TMK0100345	20010718	20090302	MACROVISION	MACROVISION CORPORATION	N
TMK0100346	20010718	20100829	X O (AND DESIGN)	LEE KUM KEE CO., LTD.	N
TMK0100347	20010718	20020817	CHEMSTRIP BG	ROCHE DIAGNOSTICS CORPORATION	N
TMK0100348	20010718	20110115	NEUTROGENA	NEUTROGENA CORPORATION	N
TMK0100349	20010719	20101002	EMPORIO ARMANI GA AND DESIGN	GA MODEFINE S.A.	N
TMK0100350	20010719	20101109	WHITE TOPPED FENCE POST DESIGN	CASCADE STEEL ROLLING MILLS, INC	N
TMK0100351	20010719	20061231	DOLCE VITA	PARFUMS CHRISTIAN DIOR, S.A.	N
TMK0100352	20010719	20101114	ACCU-CHEK	ROCHE DIAGNOSTICS GMBH	N
SUBTOTAL RECORDATION TYPE			78		
TNM0100001	20010718	99999999	TRADE DRESS	NILES AUDIO CORPORATION	N
SUBTOTAL RECORDATION TYPE			1		
TOTAL RECORDATIONS ADDED THIS MONTH			108		

TREASURY ADVISORY COMMITTEE ON COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of meeting.

SUMMARY: This notice announces the date, time, and location for the quarterly meeting of the Treasury Advisory Committee on Commercial Operations (COAC), and the provisional agenda for consideration by the Committee.

DATES: The next meeting of the Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service will be held on Friday, September 14, 2001 at 9:00 a.m. in Detroit, MI. The duration of the meeting will be approximately four hours.

FOR FURTHER INFORMATION CONTACT: Gordana S. Earp, Deputy Director, Tariff and Trade Affairs (Enforcement), Office of the Under Secretary (Enforcement), Telephone: (202) 622–0336.

At this meeting, the Advisory Committee is expected to pursue the following agenda. The agenda may be modified prior to the meeting.

Agenda:

1) Merchandise Processing Fee
2) Office of Rules & Regulations—Ruling Backlog
3) Compliance Assessment Team Program
4) Import Data & Customs Entry Issues: including ACE (Automated Commercial Environment) development; impact of bill S.1214; "Port and Maritime Security Act of 2001"; Study on Entry Procedures and Data Requirements
5) Update on Other Customs Matters

SUPPLEMENTARY INFORMATION: The meeting is open to the public; however, participation in the Committee's deliberations is limited to Committee members, Customs and Treasury Department staff, and persons invited to attend the meeting for special presentations. A person other than an Advisory Committee member who wishes to attend the meeting should contact Theresa Manning at (202) 622–0220 or Helen Belt at (202) 622–0230.

Dated: August 21, 2001.

TIMOTHY E. SKUD,
Acting Deputy Assistant Secretary,
Regulatory, Tariff, and Trade.

EXTENSION OF GENERAL PROGRAM TEST FOR TRANSFER OF INTERNATIONAL IN-TRANSIT BAGGAGE

AGENCY: Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document announces that the test originally announced in the Federal Register on February 23, 2000, and modified by a notice published in the Federal Register on June 16, 2000, regarding the transfer of international in-transit baggage is being extended for an additional year. The time for applying to participate in the test also is being reopened for an additional six-month period.

DATES: The testing period is extended to August 16, 2002. Written applications to participate in the test must be filed with Customs on or before February 15, 2002.

ADDRESSES: Air carriers that have entered into an agreement with the Government by signing an Advance Passenger Information System (APIS) Memorandum of Understanding may apply to participate in the program test by submitting a letter of application to the port director with jurisdiction over the airport where the transfer of international in-transit baggage will occur. Air carriers that wish to participate in the test can apply to participate in the APIS program by contacting Mike Cronin, Acting Executive Associate Commissioner for the Office of Programs, U.S. Immigration & Naturalization Service, 425 I Street, N.W., Washington, D.C. 20536.

FOR FURTHER INFORMATION CONTACT:

For operational or policy matters: Carlene Warren, Passenger Programs Branch, Office of Field Operations (202) 927–1391.

For regulatory matters: Larry L. Burton, Office of Regulations and Rulings (202) 927–1287.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 23, 2000, Customs published a general notice in the Federal Register (65 FR 9054) announcing a program test that allows participating air carriers to more efficiently transfer accompanied air passenger baggage from one aircraft entering the United States to another aircraft departing from the United States enroute to a foreign destination. Under the test, participating air carriers will not be required to file an air cargo manifest (Customs Form 7509) but will instead electronically transmit certain required information to Customs while a flight is enroute to the United States.

The notice specified that the test covers accompanied, international, in-transit, checked baggage that arrives in the United States aboard one aircraft and departs from the United States aboard another air-

craft. (This baggage is referred to as international-to-international baggage or ITI baggage.) The notice explained the air cargo manifest requirement and the ordinary ITI baggage processing procedure as provided for under the Customs Regulations; described the Advance Passenger Information System (APIS) program; set forth the eligibility requirements for participation in the test, the information transmission and baggage processing procedures required under the test, and the test application process; and requested comments on all aspects of the test.

On April 3, 2000, Customs published a general notice in the Federal Register (65 FR 17550) to announce an extension of the time period for applying to participate in the test. The application period was extended to May 26, 2000. On June 16, 2000, Customs published a notice in the Federal Register (65 FR 37828) to announce a modification of the test program based on a review of the comments received and a reevaluation of the test. That June 16, 2000, notice also provided for a new application period, to July 31, 2000, and stated that the modified program test would commence no earlier than August 15, 2000, and would run for approximately one year.

Customs has determined that the test as it is currently being conducted should be extended for an additional year and that the time for applying to participate in the test should be reopened for a new six-month period. Extending the test period and reopening the application process will enable Customs to more fully evaluate the results of the test and formulate proposals to amend the Customs Regulations, as may be appropriate, to adopt the procedures under the test on a more permanent basis.

Accordingly, the testing period is extended to August 16, 2002, and applications to participate in the test will be accepted by Customs through February 15, 2002. Customs notes that both the notice published on February 23, 2000, and the notice published on June 16, 2000, should be consulted for a fuller understanding of the various aspects of the program test, as the latter notice did not modify all aspects of the test. In addition, as the application process was modified in the notice of June 16, 2000, that notice should be consulted on how to apply for participation in the test.

Dated: August 21, 2001.

BONNI G. TISCHLER,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, August 27, 2001 (66 FR 45077)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 22, 2001.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

DOUGLAS M. BROWNING,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO CARRYING CASES FOR DIABETES MONITORING SYSTEMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letters and revocation of treatment relating to tariff classification carrying cases for diabetes monitoring systems.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking three ruling letters pertaining to the tariff classification of carrying cases for diabetes monitoring systems under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocations was published in the CUSTOMS BULLETIN of July 11, 2001, Vol. 35, No. 28. One comment was received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 5, 2001.

FOR FURTHER INFORMATION CONTACT: Joe Shankle, Textiles Branch, (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke Headquarters Ruling Letter (HQ) 962581, dated February 23, 2000, HQ 958000, dated October 20, 1995, and HQ 958048, dated November 6, 1996, was published on July 11, 2001, CUSTOMS BULLETIN, Volume 35, Number 28. One comment was received in response to the notice.

In HQ 962581, Customs classified a carrying case for diabetics under subheading 9027.90.54, HTSUSA, as "* * * accessories: Of electrical instruments and apparatus: Other: Of instruments and apparatus of subheading 9027.20, 9027.30, 9027.40, 9027.50 and 9027.80." It is Customs position that carrying cases for diabetics of the type discussed herein, are classifiable in subheading 4202.92.9060, HTSUSA, which provides, in part, for "other" containers or cases.

In HQ 958000, Customs classified a carrying case for diabetics under subheading 4202.92.3030, HTSUSA, which provides, in part, for travel, sports and similar bags: with outer surface of textile materials: Other, Other: Of man-made fibers: Other. It is Customs position that carrying cases for diabetics of the type discussed herein, are classifiable in subheading 4202.92.9026, HTSUSA, which provides, in part, for "other" containers or cases.

In HQ 958048, Customs classified a carrying case for diabetics under subheading 4202.32.1000, HTSUSA, which provides for: "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics." It is Customs position that carrying cases for diabetics of the type discussed herein, are classifiable in subheading 4202.92.9060, HTSUSA, which provides, in part, for "other" containers or cases.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQ 962581, HQ 958000 and HQ 958048, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise

pursuant to the analysis set forth in HQ 964614 revoking HQ 962581 (Attachment A), HQ 964615 revoking HQ 958000 (Attachment B), and HQ 964616 revoking HQ 958048 (Attachment C). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions that is contrary to the position set forth in this notice.

As stated in the proposed notice, this revocation will cover any rulings that are contrary to the position set forth in this notice which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) contrary to the position set forth in this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that is contrary to the positin set forth in this notice. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Dated: August 21, 2001.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 21, 2001.

CLA–2 RR:CR:TE 964614 JFS
Category: Classification
Tariff No. 4202.92.9060 and 9817.00.96

LEONARD L. ROSENBERG
SANDLER, TRAVIS & ROSENBERG, P.A.
The Waterford
5200 Blue Lagoon Drive
Miami, FL 33126–2022

Re: Revocation of Headquarters Ruling Letter (HQ) 962581, dated February 23, 2000; Classification of a Carrying Case for a Diabetes Monitoring System; Nairobi Protocol; Heading 4202, HTSUSA; Binocular Cases, Camera Cases, Musical Instrument Cases and Similar Containers; Not Heading 9027, HTSUSA; Not Accessories of Instruments and Apparatus for Physical or Chemical Analysis

DEAR MR. ROSENBERG:

On February 5, 1999, Customs received your request for a binding ruling on a carrying case for the Accu-Check Diabetes Monitoring System. In response, Customs issued two rulings. In HQ 561283, dated August 26, 1999, Customs ruled that the subject case was "specially designed or adapted for the handicapped" within the meaning of the Nairobi Protocol, Annex E, to the Florence Agreement, as codified in the Education, Scientific, and Cultural Materials Act of 1982, and was thus eligible for duty-free treatment under subheading 9817.00.96, of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). In HQ 962581, Customs classified the subject case under subheading 9027.90.54, HTSUSA, as "* * * accessories: Of electrical instruments and apparatus: Other: Of instruments and apparatus of subheading 9027.20, 9027.30, 9027.40, 9027.50 and 9027.80."

This letter is to inform you that Customs has reconsidered HQ 962581. After review of the ruling, it has been determined that the classification of the case for the diabetes monitoring system in subheading 9027.90.54, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes HQ 962581. However, Customs ruling in HQ 561283, concerning the eligibility of the carrying case for preferential tariff treatment under the Nairobi Protocol was correct and is not revoked or otherwise modified in this ruling.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of HQ 962581 was published on July 11, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 28. You submitted one comment regarding two issues in response to the notice. The first issue addressed why Customs ruling in HQ 962581 was correct. The instant ruling fully addresses the basis for revoking HQ 962581, therefore no further analysis is necessary.

You also contend that when Customs issued HQ 962132, dated October 26, 2000, Customs "effectively revoked HQ 962581." In HQ 962132, Customs acknowledged that the position it was taking was contrary to the position taken by Customs in HQ 962581. Customs further stated that it was in the process of reviewing all of the rulings concerning diabetes monitoring carrying cases to determine if they needed to be revoked. You assert that, in so doing, Customs revoked HQ 962581 without notice as required by 19 U.S.C. 1625 (c). This argument fails. HQ 962132 only concerned the items under consideration in that ruling. Only the instant ruling has the effect of revoking HQ 962581. Moreover, you have failed to demonstrate that your client suffered any harm as a result of HQ 962132.

Facts:

The subject carrying case was described in both HQ 561283 and HQ 962581, as follows:

> The article under consideration is described as a carrying case for a diabetes monitoring system. This system is designed to permit a diabetic patient to perform reliable blood glucose self-monitoring (*i.e.*, ascertaining whether the patient's capillary whole blood glucose value is either too high or too low) as a necessary part of treatment. The

system consists of a blood glucose monitor (with batteries), ten instant test strips, an adjustable lancet device with ten lancets, control solution, a self-test diary, a user's manual and reference guide which are all contained within a carrying case.

To perform the necessary test, the patient must place a test strip into the monitor and, after pricking a fingertip with the lancet device, apply a drop of blood to the center of the strip's test pad. The monitor automatically begins to measure the patient's blood glucose level as soon as it senses the drop of blood on the strip. After approximately twelve seconds, the test results are displayed on the monitor. A visual color check can then be made immediately following the test by comparing the reaction color on the test strip with the color chart on the test strip vial. This visual check can be used to confirm the value obtained by the monitor. Once a patient's blood glucose level is determined, he or she can then, if necessary, inject insulin.

The sample carrying case under consideration, measures approximately 4″ x 6″ x 1-1/2″, and contains a zipper that extends along three sides of the pouch, permitting the pouch to lie flat when fully opened. Although the sample submitted is made of vinyl, we are informed that other materials (*e.g.*, leather or textile) may be used for the outermost covering in future shipments. Regardless of the material used on the outside of the case, the inside of the cases will all have identical features. Into the left side of the case are sewn two elastic bands: one horizontal band designed to hold the round vial of test strips and a second vertical band designed to hold the two-inch monitor. We are informed that future imports may include two vertical bands to provide better support for the monitor. Into the center or spine of the case is sewn a smaller, vertical elastic band designed to hold the lancet device. The right side of the case includes a zippered textile (or plastic) pouch designed to hold the individual lancets and bottle of control solution as well as a small pocket to hold the self-test diary and reference guide.

You indicate that the carrying cases imported by your client are sold only to the manufacturer of the diabetes monitoring system, who has supplied the specifications and material necessary for their manufacture.

Issue:

Is the carrying case for a diabetes monitoring system properly classifiable under heading 4202, HTSUSA, as a similar container to the *eo nomine* exemplars of the heading or under heading 9027, HTSUSA, as an accessory to instruments and apparatus for physical or chemical analysis?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

Heading 9027, HTSUSA, provides for:

> Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes; parts and accessories thereof

Note 2 to Chapter 90, HTSUSA, states, in part, that parts and accessories for machines, apparatus, instruments or articles of Chapter 90 are to be classified according to the following rules:

> (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85 or 91 (other than heading 8485, 8548 or 9033) are in all cases to be classified in their respective headings;
>
> (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading (including a machine, instrument or apparatus of heading 9010, 9013 or 9031) are to be classified with the machines, instruments or apparatus of that kind;
>
> (c) All other parts and accessories are to be classified in heading 9033.

In HQ 962581, Customs classified the instant carrying case under heading 9027, HTSUSA. Customs stated that the diabetic monitoring system was described by heading 9027, HTSUSA, and, relying on Chapter Note 2, Chapter 90, HTSUSA, Customs classified the carrying case as an accessory under subheading 9027.90.54, HTSUSA. Noting that the term "accessory" is generally understood to mean an article of secondary importance which contributes to the effectiveness of a principal article, Customs stated that the carrying case qualified as an accessory because it facilitated the use and handling of the system's components.

However, prior to HQ 962581, Customs had consistently classified similar articles, often described as "diabetic carrying cases" under heading 4202, HTSUSA. See New York Ruling Letter (NY) E84197, dated August 16, 1999; NY E81946, dated May 28, 1999; Port Ruling Letter (PD) C88022, June 4, 1998; HQ 958048, dated November 6, 1996; HQ 958000, dated October 20, 1995; NY 809003, dated April 26, 1995; and NY 804966, dated December 19, 1994.

Heading 4202, HTSUSA, provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

The EN to heading 4202, HTSUSA, state that the heading only covers the specifically named containers and similar containers. Applying the principle of statutory construction known as *ejusdem generis*, which means "of the same kind," Customs finds that the instant carrying case is covered by the term "similar containers."

Under the rule of *ejusdem generis*, where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. With respect to the broad reach of the residual provision for "similar containers" in heading 4202, HTSUSA, the courts have found that the rule of *ejusdem generis* requires that the imported merchandise possess the essential characteristices or purpose that unite the articles enumerated in order to be classified under the general term. *Totes, Inc. v. United States*, 18 Ct. Int'l Trade 919, 865 F. Supp. 867, 871 (1994), *aff'd*, 69 F.3d 495 (1995). In *Totes*, the Court of Appeals for the Federal Circuit (CAFC) affirmed the Court of International Trade's (CIT) determination that the "essential characteristics and purpose of Heading 4202 exemplars are * * * to organize, store, protect and carry various items." Applying the rationale set forth in *Totes*, Customs finds that the instant carrying case serves the purposes of organizing, storing, protecting and carrying various blood glucose monitoring system items and is therefore classified under heading 4202, HTSUSA, as a "similar container."

The conflict between the "similar containers" provision of heading 4202, HTSUSA, and provisions for "accessories" was also resolved in the *Totes* case. The CAFC held that the "similar container" provision of heading 4202, HTSUSA, more specifically described a trunk organizer than the competing provision for automobile accessories. *Id.* 69 F.3d at 499. Although the trunk organizer was *prima facie* classifiable under the provision for similar containers and that for accessories for motor vehicles, the court stated that the competing provisions were not equal. *Id.* The court found that "containers," which essentially have the one principal function of containing, even though encompassing a wide variety of items, is a more specific term than "accessory" which can include a wide variety of items having many different functions. *Id.* Applying this rationale to the instant case, we find that the carrying case is more specifically described by the provision for "similar containers" of heading 4202, HTSUSA, than the competing provision for accessories of instruments for physical or chemical analysis.

One distinguishable aspect of the *Totes* case must be addressed. In *Totes*, the applicable EN stated that accessories covered more specifically by another heading were excluded from the section. Furthermore, the EN listed tool bags of heading 4202, HTSUSA, as an example of an accessory covered more specifically by heading 4202, HTSUSA. In contrast, Note 2 to Chapter 90, HTSUSA, and the EN applicable to the present case do not contain similar language. However, Customs notes that the decision in the *Totes* case was not based

on the EN. The EN were merely cited in support of the court's decision that the provision for similar containers was more specific than the provision for accessories.

Cases for instruments of Chapter 90, HTSUSA, are not classifiable under the provision for accessories. Camera cases and binocular cases are *eo nomine* exemplars of heading 4202, HTSUSA, and are classified in heading 4202, HTSUSA, despite the fact that they are also accessories to cameras and binoculars classified in Chapter 90, HTSUSA. Customs believes that heading 4202, HTSUSA, would not specifically name these cases if the intent was to apply Note 2 to Chapter 90, HTSUSA, and classify cases as accessories to the goods of Chapter 90, HTSUSA. Customs is unable to distinguish the diabetes monitoring system carrying case from the eo nomine exemplars and "similar containers" of heading 4202, HTSUSA. Thus, the instant carrying case is properly classified with other similar specially shaped or fitted cases of heading 4202, HTSUSA.

With respect to classification at the subheading level, the article was classified at the time of entry under subheading 4202.32, HTSUSA, as an article of a kind normally carried in the pocket or in the handbag. However, the instant carrying case is not similar to the exemplars listed in the EN for subheading 4202.32, HTSUSA, such as wallets, key-cases and cigarette cases. Although it is of a size similar to the goods of subheading 4202.32, HTSUSA, Customs finds that its characteristics and functions are similar to other specialty cases such as musical instrument cases, camera cases, binocular cases and compact disk cases which are classified under subheading 4202.92, HTSUSA. Accordingly, Customs finds that the carrying case is classified under subheading 4202.92.9060, HTSUSA, which provides, in part, for "Trunks, suitcases * * * spectacle cases, binocular cases, camera cases * * *: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, Other: Other."

For a similar ruling, see HQ962132, dated October 26, 2000.

Holding:

The carrying case for the Accu-Check Diabetes Monitoring System is classified under subheading 4202.92.9060, HTSUSA. However, pursuant to Customs prior decision in HQ 561283, the carrying case is eligible for duty-free treatment under subheading 9817.00.96, HTSUSA, the provision for "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons; parts and accessories (except parts and accessories of braces and artificial limb prosthetics) that are specially designed or adapted for use in the foregoing articles: Other". The general column one duty rate is "Free."

Effect on Other Rulings:

HQ 962581, dated February 23, 2000, is hereby REVOKED. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 21, 2001.

CLA–2 RR:CR:TE 964615 JFS
Category: Classification
Tariff No. 4202.92.9026

MR. MARTY LANGTRY
TOWER GROUP INTERNATIONAL, INC.
2400 Marine Avenue
Redondo Beach, CA 90278–1103

Re: Revocation of HQ 958000, dated October 20, 1995; Classification of a Carrying Case for Diabetics; Heading 4202, HTSUSA; Binocular Cases, Camera Cases, Musical Instrument Cases and Similar Containers.

DEAR MR. LANGTRY:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter (HQ) 958000, issued on October 20, 1995, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a carrying case for diabetics. After review of that ruling, it has been determined that the classification of the carrying case in subheading 4202.92.3030, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes HQ 958000.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of HQ 958000 was published on July 11, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 28. One comment was submitted in response to the notice.

Facts:

In HQ 958000, Customs sustained its decision in New York Ruling Letter (NY) 809004, dated April 26, 1995, classifying the article under consideration in subheading 4202.92.3030, HTSUSA (now subheading 4202.92.3031, HTSUSA). Subheading 4202.92.3030, HTSUSA, provides, in part, for "Travel, sports and similar bags: with outer surface of textile materials: Other, Other: Of man-made fibers: Other."

In HQ 958000, the carrying case was described as follows:

> The cases, which are designed to carry small medical supplies, will be imported empty and sold only to a medical equipment company. That company will insert supplies needed by diabetics (e.g., syringes, testing tools, etc.), then sell the kits to doctors, hospitals, or clinics, which will either sell or give them to diabetics.
>
> The sample is a carrying bag that measures approximately 7 inches in length by 4-1/4 inches in height by 1-1/2 inches in depth, is zippered on 3 sides, and is similar to a travel or toiletry case. The bag's exterior is composed of nylon woven fabric. The interior features 2 clear plastic pockets, each of which extends the length and height of each side. A nylon zippered bag, which measures approximately 6-1/2 inches by 3-1/4 inches, is sewn into one of the interior ends.

Issue:

Is the carrying case for diabetics properly classified under subheading 4202.92.3031, HTSUSA, the provision for "travel, sports and similar bags," or is it properly classified under subheading 4202.92.9026, the provision for "other" containers or cases?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

The carrying case is classified in heading 4202, HTSUSA, which provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

At the subheading level, the carrying case can be classified as a travel, sports or similar bag under subheading 4202.92.31, HTSUSA, or it can be classified as an "other" container or case under subheading 4202.92.9026. The additional U.S. notes become applicable at the eight-digit level or U.S. subdivision of the international subheadings. Concerning travel, sports and similar bags, Additional U.S. Note 1 to chapter 42, HTSUS, states that:

> For the purposes of heading 4202, the expression "travel, sports and similar bags" means goods, other than those falling in subheadings 4202.11 through 4202.39, of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading, but does not include binocular cases, camera cases, musical instrument cases, bottle cases and similar containers.

In HQ 962132, dated October 26, 2000, Customs considered the classification of carrying cases for a blood glucose monitoring system. The carrying cases were designed with specially fitted compartments to hold the components of the monitoring system. Customs found that the carrying cases had the same characteristics and functions as other specialty cases such as musical instrument cases, camera cases, binocular cases and compact disk cases. Due to the similarity of the cases, Customs classified the carrying cases for the blood glucose monitoring system in the same subheading as the specially fitted cases, i.e., subheading 4202.92.90, HTSUSA.

Like the carrying cases in HQ 962132, the instant carrying case is designed with specially fitted compartments to hold and carry supplies needed by diabetics. The instant carrying case has the same characteristics and functions as the specialty cases that are classified under subheading 4202.92.9026, HTSUSA, as "other" containers or cases. Moreover, these specialty cases are specifically excluded from classification as "travel, sports and similar bags" by operation of Additional U.S. Note 1 to chapter 42, HTSUSA. Accordingly, Customs finds that the carrying case is classified under subheading 4202.92.9026, HTSUSA, which provides, in part, for "Trunks, suitcases * * * spectacle cases, binocular cases, camera cases * * *: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, Other: Of man made fibers." See, HQ 962132. See also, Port Decision (PD) 88022, dated June 4, 1998.

Holding:

HQ 958000 is revoked. The carrying case for diabetics is classified under subheading 4202.92.9026, HTSUSA. The general column one duty rate is 18.6% ad valorem and the applicable textile category designation is 670.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that the importer check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, the importer should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

Effect on Other Rulings:

HQ 958000, issued on October 20, 1995, is hereby REVOKED. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 21, 2001.

CLA–2 RR:CR:TE 964616 JFS
Category: Classification
Tariff No. 4202.92.9060

MS. ELLEN L. FEDERMAN
SOLLER, SHAYNE & HORNE
65 Franklin Street
Boston, MA 02110

Re: Revocation of HQ 958048, dated November 6, 1996; Classification of a Carrying Case for a Blood Glucose Monitoring System; Diabetes; Heading 4202, HTSUSA; Binocular Cases, Camera Cases, Musical Instrument Cases and Similar Containers.

DEAR MS. FEDERMAN:

This letter is to inform you that Customs has reconsidered Headquarters Ruling Letter (HQ) 958048, issued to you on behalf of your client MediSense, Inc., on November 6, 1996, concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of carrying cases for blood glucose testing kits. After review of that ruling, it has been determined that the classification of the carrying cases in subheading 4202.32.1000, HTSUSA, was incorrect. For the reasons that follow, this ruling revokes HQ 958048.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–82, 107 Stat. 2057, 2186), notice of the proposed revocation of HQ 958048 was published on July 11, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 28. One comment was submitted in response to the notice.

Facts:

The carrying cases that are the subject of this revocation were reclassified at entry in subheading 4202.92.9040, HTSUSA (now 4202.92.9060, HTSUSA), the provision for "Trunks, suitcases, vanity cases * * * and similar containers; traveling bags, toiletry bags * * * and similar containers * * *: Other: With outer surface of sheeting of plastic * * *: Other: Other, Other." The importer contested this classification, contending that the proper classification for the carrying cases is under subheading 4202.32.1000, HTSUSA, the provision for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics." Customs agreed with the protestant and issued HQ 958048.

In HQ 958048, the carrying cases were described as follows:

> Each of the two available sample cases is substantially identical in appearance to the other, except for the fact that one is labeled "Made in China" and the other is labeled "Made in Belgium." The articles are tri-fold in design and have snap closures. When folded/closed, the items measure approximately 5-3/4 inches in width by 3-1/4 inches in height by 1/2 inch in depth.
>
> The outer surface of the case marked "Made in Belgium" is composed of embossed cellular polyvinyl chloride (PVC) plastic, one side of which has been applied to a layer of nonwoven textile fabric. The case marked "Made in China" has a layered structure, the outer layer of which is composed of embossed non-cellular polyurethane plastic. The second layer consists of a cellular PVC plastic. The third layer is an adhesive which bonds the fourth layer, a nonwoven textile fabric, to the cellular plastic second layer. The textile material in both cases, is present for purposes of reinforcement.
>
> The cases are intended for post importation use as carrying cases for diabetes (blood glucose) testing kits. The interior sections of each case contain two clear plastic compartments to hold test strips and a sensor, vinyl slots for lancets, and an elasticized loop to hold a lancing device in place. Information on retail packaging states, in part, that the case (with contents) is "Compact—fits in pocket or purse. Convenient—test practically anywhere, anytime.

Issue:

Are the carrying cases for blood glucose monitoring kits properly classified under subheading 4202.32, HTSUSA, as an article of a kind normally carried in the pocket or in the handbag, or under subheading 4202.92.90, as an "other" container or case?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI.

The carrying cases are classified in heading 4202, HTSUSA, which provides for:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

At the subheading level, the articles were classified in HQ 958948 under subheading 4202.32, HTSUSA, as articles of a kind normally carried in the pocket or in the handbag. However, the carrying cases are not similar to the exemplars listed in the EN for subheading 4202.32, HTSUSA, such as wallets, key-cases and cigarette cases. Although they are of a size similar to the goods of subheading 4202.32, HTSUSA, Customs finds that their characteristics and functions are similar to other specialty cases such as musical instrument cases, camera cases, binocular cases and compact disk cases which are classified under subheading 4202.92, HTSUSA. Accordingly, Customs finds that the carrying cases are classified under subheading 4202.92.9060, HTSUSA, which provides, in part, for "Trunks, suitcases * * * spectacle cases, binocular cases, camera cases * * *: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, Other: Other." See, HQ 962132, dated October 26, 2000. See also, Port Decision (PD) 88022, dated June 4, 1998;

Holding:

The carrying cases for the blood glucose monitoring kits are classifiable under subheading 4202.92.9060, HTSUSA. The general column one duty rate is 18.6% *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In order to ensure uniformity in Customs' classification of this merchandise and eliminate uncertainty, pursuant to section 177.9(d)(1), Customs Regulations (19 CFR 177.9(d)(1)), HQ 958048 is revoked.

In *San Francisco Newspaper Printing Co. v. United States*, 9 C.I.T. 517, 620 F. Supp. 738 (1985), the Court of International Trade held that Customs is not authorized to rescind a denial of a protest. Therefore, we cannot reconsider our position with respect to the entries at issue in HQ 958048. However, with respect to future importations of the subject merchandise, HQ 958048 will no longer control the classification.

Effect on Other Rulings:

HQ 958048, issued on November 6, 1996, is hereby REVOKED. In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

James L. Watson
Herbert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 01–104)

VIRAJ GROUP, LTD., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CARPENTER TECHNOLOGY, CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 00–06–00291

[In response to Plaintiff's Rule 56.2 motion for judgment on the agency record and Defendant's and Defendant-Intervenors' memoranda in opposition to Plaintiff's Rule 56.2 motion, the Department of Commerce's decision in *Stainless Steel Wire Rod from India; Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 31,302 (May 17, 2000) is sustained in part and remanded in part.]

(Dated August 15, 2001)

Ablondi, Foster, Sobin & Davidow (Peter Koenig), Washington, D.C., for Plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Lucius B. Lau*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant.

Collier Shannon Scott, PLLC (Robin H. Gilbert, Laurence J. Lasoff), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* This action challenges the United States Department of Commerce's (Commerce) determination in *Stainless Steel Wire Rod from India; Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 31,302 (May 17, 2000) *(Final Results)*. Plaintiff has filed a motion for judgment on the agency record asserting that Commerce's determination resulted in an inaccurate dumping margin. The United States and Defendant-Intervenors (collectively Defendants) oppose Plaintiff's motion.

BACKGROUND

On December 1, 1993, Commerce published antidumping duty orders on certain stainless steel wire rod (SSWR) imported from India. *See Antidumping Duty Order: Certain Stainless Steel Wire Rod from India*, 58 Fed. Reg. 63,335 (December 1, 1993). On December 8, 1998, the agency

published a notice of opportunity to request an administrative review of this antidumping duty order for subject merchandise imported between December 1, 1997 and November 30, 1998. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 63 Fed. Reg. 67,646 (December 8, 1998). In response to this notice, Viraj Group[1] (Viraj or Plaintiff) and two other Indian manufacturers[2] requested an administrative review. *See Certain Stainless Steel Wire Rod From India; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review,* 65 Fed. Reg. 1,597, 1,597 (January 11, 2000) *(Preliminary Results).*

On February 22, 1999, Commerce initiated its review. During its investigation, Commerce determined that Plaintiff had no sales of subject merchandise in the home market within the period of review. Therefore Commerce was required to establish normal value through some other means. *See id.* at 1,599. After rejecting the use of Plaintiff's third-country sales for normal value because of a lack of contemporaneous sales of foreign like product in the comparison market, Commerce constructed a value in accordance with its statutory and regulatory guidelines. *See id.* Ultimately, Commerce published its *Final Results* on May 17, 2000, concluding that an antidumping duty rate of 11.88% should be applied to Plaintiff's imports of subject merchandise. *See Final Results*, 65 Fed. Reg. 31,302.

Plaintiff timely filed suit with the Court challenging three aspects of Commerce's *Final Results.* Specifically, Plaintiff asserts: (1) the exchange rate used by Commerce to convert Indian rupees into United States dollars created an inaccurate dumping margin; (2) to account for import duties paid on raw materials, Plaintiff was entitled to an adjustment of either (i) its export price, or (ii) its cost of production or constructed value; and (3) Commerce should have used Plaintiff's actual production cost of steel billets rather than its inter-company transfer price to calculate constructed value.

For the reasons stated below, the Court remands the first issue to Commerce for further explanation as to whether Commerce's currency conversion methodology resulted in an accurate dumping margin. The Court sustains Commerce's determination with respect to the second and third issues.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994) and will sustain Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Commerce's determinations are to be afforded considerable deference. *See, e.g., Zenith Elecs. Corp. v.*

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[1] The Viraj Group is comprised of three companies: Viraj Alloys Ltd. (VAL), Viraj Impoexpo Ltd. (VIL), and Viraj Forgings Ltd. (VFL).

[2] These manufacturers ultimately withdrew their request for administrative reviews. *See Certain Stainless Steel Wire Rod From India; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review,* 65 Fed. Reg. 1,597, 1,597 (January 11, 2000).

United States, 77 F.3d 426, 430 (Fed. Cir. 1996); *Daewoo Elec. Co., Ltd. v. International Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993). Commerce may not, however, act arbitrarily, violate the antidumping laws, or apply the law in a manner contrary to congressional intent. *See Allied Tube & Conduit Corp. v. United States*, 127 F. Supp. 2d 207, 219 (Ct. Int'l Trade 2000), *citing, Smith Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983); *Hussey Copper Ltd. v. United States*, 895 F. Supp. 311, 314 (Ct. Int'l Trade 1995).

Commerce's factual determinations must be supported by substantial evidence on the record. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Under this standard, the Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if some evidence detracts from the agency's conclusion. *See Heavafil Sdn. Bhd. & Filati Lastex Sdn. Bhd. v. United States*, 2001 WL 194986, *2 (Ct. Int'l Trade), *citing, Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984).

In determining whether Commerce's interpretation of the antidumping statute is "in accordance with law," this Court must consider whether the statute unambiguously addresses the question at issue and, if not, whether the agency's interpretation of the statute is reasonable in light of the overall statutory scheme. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). This Court accords considerable weight to Commerce's construction of the antidumping laws, *see E.I. Du Pont De Nemours & Co. v. United States*, 8 F. Supp. 2d 854, 857 (Ct. Int'l Trade 1998), but does not fulfill its duty to say what the law is by perfunctorily agreeing with Commerce's interpretation of the relevant statutory provision. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). Rather, through the application of traditional tools of statutory construction, this Court must examine whether Congress expressed its intent on the matter at issue. Only if Congress was silent or ambiguous with respect to the question at issue can the Court assess whether Commerce's construction thereof is reasonable or merely a *post hoc* rationalization. *See id.* at 882. To survive judicial scrutiny, however, "an agency's construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation * * *. [A] court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *U.S. Steel Group v. United States*, 225 F.3d 1284, 1287 (Fed. Cir. 2000); *NSK Ltd. v. United States*, 115 F.3d 965, 973 (Fed. Cir. 1997); *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (internal citation omitted) (emphasis in original).

I. *Commerce's currency conversion methodology appears to disregard a devaluation in the Indian rupee, resulting in a dumping margin that is unsupported by substantial evidence and contrary to law.*

To determine whether a company is selling goods in the United States at less than fair value, Commerce compares the normal value of the subject merchandise to the price at which that merchandise is being sold in the United States. *See* 19 U.S.C. § 1677b(a) (1994). Such comparison, however, frequently requires that Commerce calculate values denominated in different currencies. To correct for the differences in value associated with different currencies, the antidumping law requires that "the administering authority [] convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise." 19 U.S.C. § 1677b–1(a) (1994). The only statutory exception to this requirement is when a "currency transaction on [the] forward markets is directly linked to an export sale under consideration." *Id.* Under these circumstances, "the exchange rate specified with respect to such currency in the forward sale agreement shall be used to convert the foreign currency." *Id.* The statutory exception is not applicable in this case.

Commerce selected the November 3, 1997 purchase order date as the date of sale. The agency acknowledged that "[w]hile the Department normally will use the date of invoice as the date of sale, we have determined in this case that the purchase order date better reflects the date on which Viraj established the material terms of sale. In this case, Viraj stated in its April 19, 1999 questionnaire response that the material terms of sale are set at order date. *Preliminary Results,* 65 Fed. Reg. at 1,598. Commerce further acknowledged that its chosen date of sale fell outside the period of review. It justified its selection on the grounds that it possesses discretion to consider sales which fall outside the period of review and that, according to its practice, it had reviewed sales of merchandise shipped to the U.S. during the period of review. *See id.*

Based on its date of sale determination and pursuant to the requirements of 19 U.S.C. § 1677b–1(a) and 19 C.F.R. § 351.415,[3] Commerce used the November 3, 1997 exchange rate to convert Indian rupees into United States dollars. The exchange rate on this date was 36.40 rupees per dollar. Between the date of sale and November 30, 1998 (the end of the period of review), the rupee devalued over 10 percent to a rate of 42.65 rupees per dollar.[4]

A. *Parties' Contentions*

Plaintiff contends that use of the November 3, 1997 exchange rate distorted the dumping margin calculations in the following manner. First, the post-November 3, 1997 rupee devaluation increased Viraj's cost of

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[3] 19 C.F.R. § 351.415 provides:

(a) In general. In an antidumping proceeding, the Secretary will convert foreign currencies into United States dollars using the rate of exchange on the date of sale of the subject merchandise.
(c) Exchange rate fluctuations. The Secretary will ignore fluctuations in exchange rates.

[4] The source for this information is the Department of Commerce's Exchange Rates for Administrative reviews at <www.ita.doc.gov/import_admin/records/exchange/india.txt>.

production, in part by requiring Viraj to pay more rupees for its imported raw materials. Second, because of the devaluation, Viraj ultimately received more rupees for the U.S. dollar price of the subject merchandise, thereby offsetting the increase in cost of production. Third, the dumping margin failed to reflect this offset because Commerce's use of the November 3, 1997 exchange rate caused the rupees actually received by Viraj to be understated by about 16 percent. Plaintiff claims the 11.88 percent dumping margin found in the *Final Results* is entirely due to this failure to account for devaluation.

In support of its contention, Plaintiff argues Commerce must determine dumping margins as accurately as possible, and Court precedent does not permit Commerce to mechanically apply its exchange rate methodology or to create an artificial dumping margin. Plaintiff criticizes Commerce for including no claim of accuracy in its *Decision Memorandum*.[5]

Plaintiff further argues Commerce could have used a different exchange rate because it has discretion to determine the date of sale. The statute and regulations state the exchange rate at the date of sale must be used but do not determine the precise date of sale. Plaintiff specifically argues the invoice date should be the date of sale because delivery and payment dates changed between the purchase order date and invoice date.

Plaintiff also argues that the currency conversion statute and regulation are structured in such a way as to, in certain circumstances, require the use of an exchange rate date other than the date of sale. Citing to the fact that the currency conversion rules are captioned under the heading "In General," Plaintiff argues that exceptional circumstances may exist that would require Commerce to deviate from the general rule. Plaintiff argues this case presents such exceptional circumstances.

Finally, Plaintiff argues Commerce's failure to use the rupee value actually received and recorded in Viraj's books is inconsistent with past agency practices.

Defendants counter that 19 U.S.C. §1677b–1 and 19 C.F.R. § 351.415 require Commerce to use the exchange rate in effect upon the date of sale, not the date payment is received. In addition, Defendants state 19 C.F.R. §351.401(i) limits Commerce's date of sale choices to the invoice date or a date better reflecting the establishment of material terms of sale, and although the invoice date is the presumptive date of sale, 19 C.F.R. §351.401(i) does not foreclose Commerce from choosing another date. Here, Defendants claim Commerce properly selected the order confirmation date as the date of sale because there were no changes to the material terms of sale between the issuance of the order confirmation sheet and the invoice. Furthermore, Defendants assert none of Viraj's transactions are forward market transactions that would trigger

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[5] All issues raised by the parties to the administrative review were addressed in the "Issues and Decision Memorandum" (*Decision Memorandum*), which was adopted by *Stainless Steel Wire Rod from India; Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 31,302 (May 17, 2000).

the exception from the general rule requiring use of the date of sale for currency conversions. Finally, Defendants argue the precedent cited by Plaintiff is factually and legally distinguishable from the case at hand.

B. *Exchange Rate Analysis*

This Court does not dispute that Commerce adhered to its regulatory and statutory obligations to utilize the exchange rate in effect on the date of sale. Commerce also adhered to 19 C.F.R. §351.401(i) in its selection of the date of sale. Under that regulation, Commerce presumptively establishes the date of sale as the invoice date unless a different date better reflects the date on which the material terms of sale were established. Substantial evidence supports Commerce's determination that the material terms of sale were established on the purchase order date. Viraj's March 24, 1999 questionnaire response stated that "[o]nce the order is confirmed there are no changes in terms of the sale." *See Questionnaire Response* (March 24, 1999), at 6, Prop. Doc. 1, Def.'s Prop. App. 1 at 6. At verification, Commerce's review of the invoices of all preselected and surprise sales revealed no changes to the terms of sale between issuance of the order confirmation sheet and the invoice. *See Sales Verification Memorandum* (January 3, 2000), at 4, Prop. Doc. 19, Def. Prop. App. 7 at 4.

Plaintiff now argues the material terms of sale were not established on the purchase order date because delivery and payment terms changed prior to the invoice date. This Court, however, will not consider Plaintiff's potentially valid argument because Plaintiff did not raise it in the administrative proceeding. Under the exhaustion doctrine, a party must present a claim for the relevant administrative agency's consideration prior to raising it before the Court. *See Fabrique de Fer de Charleroi S.A. v. United States*, 2001 WL 753810 at *2 (Ct. Int'l Trade 2001). *See also* 28 U.S.C. § 2637(d) (stating that the Court of International Trade "shall, where appropriate, require the exhaustion of administrative remedies"). Plaintiff presents no compelling justification for the Court to forego this requirement. Therefore, based on the record before it, this Court finds Commerce selected an appropriate date of sale.

Once the proper date of sale is chosen, Commerce is legally obligated to use the currency exchange rate from that date. The record indicates the sales at issue were not tied to currency exchange transactions on the forward market, thereby negating the applicability of the exception found in 19 U.S.C. § 1677b–1(a) and 19 C.F.R. § 351.415(b). Commerce therefore followed the mandate set forth by law and used the exchange rate from the date of sale. The Court cannot find Commerce's use of this date unreasonable in light of the clear language of 19 U.S.C. § 1677b–1 and 19 C.F.R. § 351.415.

The fact that Commerce's actions were reasonable in light of their statutory and regulatory mandates is not dispositive, however, of whether the 11.88 percent dumping margin assessed against Plaintiff was in accordance with law. Mere compliance with regulations cannot trump what appears to be an absurd result. Both this Court and the

United States Court of Appeals for the Federal Circuit have consistently held that Commerce is under a duty to determine dumping margins as accurately as possible. *See, e.g., NTN Bearing Corp. v. United States,* 74 F.3d 1204, 1208 (Fed. Cir. 1995); *Allied Tube & Conduit Corp.,* 127 F. Supp. 2d 207, 218 (Ct. Int'l Trade 2000). Congress acknowledged the need for accuracy when it stated, "To a large extent, the [Uruguay Round] Agreement tracks existing practice, the goal of which is to ensure that the process of currency conversion *does not distort dumping margins.*" Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 841 (1994) (emphasis added). Accordingly, this Court must not only assess the reasonableness of Commerce's actions in light of its statutory requirements but also whether the agency's actions further the antidumping statute's underlying goal of accuracy. In light of the apparent devaluation of the rupee against the dollar, it is not clear whether Commerce's use of the November 3, 1997 exchange rate results in the most accurate dumping margin possible.

As noted, Plaintiff argues that the rupee devaluation resulted in a substantial understatement of the amount of rupees actually received in payment for exported subject merchandise. The record does not provide evidence that Commerce properly considered this argument. Rather, Commerce simply stated that Viraj had provided no record evidence of a misapplication of the exchange rates and that Commerce had complied with the statute and its regulation. *See Decision Memorandum,* at 10. The only statement that could be construed as analysis of this issue is Commerce's statement that it had ignored fluctuations in the exchange rate. This statement, however, is insufficient to address the concerns raised by Plaintiff. Plaintiff submitted evidence on the record of the rupee's devaluation and the impact of this devaluation on both its costs and accounts receivable. Moreover, the extent (over ten percent) and the duration (over twelve months) of the devaluation seem to belie the notion that it was a mere fluctuation. Commerce has, in the past, recognized that sustained currency movements of greater than five percent are not fluctuations that can be ignored. *See Stainless Steel Sheet and Strip in Coils From the Republic of Korea: Final Determination of Sales at Less Than Fair Value,* 64 Fed. Reg. 30,664 (June 8, 1999); *and Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 56,759 (Oct. 21, 1999). In light of such past decisions, this Court seeks further explanation as to why Commerce disregarded the rupee's devaluation in the present case.

If Commerce has legitimate reasons for considering the rupee's devaluation to be simply a fluctuation, then Commerce arguably was within its rights to have ignored it. However, if ignoring this devaluation results in a distorted or inaccurate dumping margin, Commerce should consider alternative means to comply with the antidumping law's underlying goals. In *Budd Co., Wheel & Brake Div. v. United States,* 746 F.

Supp. 1093 (Ct. Int'l Trade 1990), this Court affirmed Commerce's use of a circumstance of sale adjustment to offset the effects of hyperinflation in Brazil between the date of sale and date of shipment. Although the Court did not require the use of a circumstance of sale adjustment to account for all changes in exchange rates, it viewed favorably Commerce's efforts to fulfill its "overriding duty to make fair comparisons between foreign market value and United States price * * *." 746 F.Supp. at 1100. This Court queries whether alternative means to comply with the underlying goal of the antidumping law should be considered.

A mere mechanical application of Commerce's exchange rate methodology would be contrary to the underlying goal of the antidumping laws.[6] Thus, this Court finds the agency's failure to explain its reasons for ignoring the devaluation and to explore methods for calculating the most accurate dumping margin possible is contrary to law. Accordingly, the Court remands this issue to Commerce for further explanation and/or recalculation as may be required.

II. *Commerce's decision not to adjust Viraj's export price or cost of production based on Viraj's receipt of benefits under India's Duty Entitlement Passbook (DEPB) program is supported by substantial evidence and otherwise in accordance with law.*

Under the Duty Entitlement Passbook (DEPB) program, the Indian government rebates duties paid on raw materials imported for use in the manufacture of exported goods. Rather than rebate the actual amount of duties paid, however, the Indian government rebates a percentage of the value of the exported product containing the imported materials. This percentage is applied equally to all exported products containing a specific imported input. *See Supplemental Questionnaire Response* (June 25, 1999), at 5, Prop. Doc. 8, Def. Prop. App. 3 at 5. Thus, the rebate is based upon the "deemed" import duties paid on imports used to manufacture the exported product. *See id.*, at 14, Prop. Doc. 8, Fiche 17, Frame 14. Viraj receives benefits under this program. *Decision Memorandum* at 3.

Commerce's sales verification report for Viraj Impoexpo Ltd. (VIL) discussed the following steps in the DEPB Passbook credit process: first, Viraj sends a bill of entry of raw material to the Indian Customs Office, listing quantity and value of the imported raw materials; second, after production and shipment of the finished product, VIL gives a form with the details of quantity and value to the Director General of Foreign Trade; third, the Director General of Foreign Trade subtracts freight and insurance costs from the value to reach an FOB[7] value of the export;

[6] This Court is sympathetic to the potential catch-22 within which Congress has placed Commerce regarding currency conversion. The statute clearly seems to establish only one exception to its general rule. As the present case indicates, however, factual scenarios may occur that do not fit within the parameters of the seeming exception but may nevertheless result in an inaccurate dumping margin. The Court invites Congress to consider whether legislation is needed to address this anomaly.

[7] *Black's Law Dictionary* defines FOB as "Free on board some location (for example, FOB shipping point; FOB destination). A delivery term which requires a seller to ship goods and bear the expense and risk of loss to the [FOB] point designated. The invoice price includes delivery at seller's expense to that location." *Black's Law Dictionary* 642 (6th ed. 1990).

fourth, this information is given to Viraj to verify the accuracy of the calculations; fifth, Viraj gives the information to Customs for payment. *Sales Verification Memorandum* (January 3, 2000), at 11, Prop. Doc. 19, Def. Prop. App. 7 at 11.

The Indian government publishes a notice of the credit an exporting company may claim under the DEPB program. *See Supplemental Questionnaire Response* (June 25, 1999), at 15, Prop. Doc. 8, Fiche 17, Frame 15. Commerce examined the Indian government's public notice, which reported a 15 percent duty drawback rate on the FOB value of stainless steel wire rod. *Sales Verification Memorandum* (January 3, 2000), at 11, Prop. Doc. 19, Def. Prop. App. 7 at 11. In addition, at verification Commerce collected a table from a generally available publication[8] which listed the rate for wire rods and billets as 15 percent of FOB value. Commerce included this table in Sales Verification Exhibit 15, to which it referred in the *Decision Memorandum*. Def. Prop. App. 8 at 4.

Commerce preliminarily adjusted Viraj's export price, adding an amount for duty drawback based on benefits received through the DEPB program because 19 U.S.C. §1677a(c)(1)(B) provides that export price (or constructed export price) shall be increased by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." *See Preliminary Results*, 65 Fed. Reg. at 1,598–99, citing section 772(c)(1)(B) of the Tariff Act of 1930. Petitioners challenged this adjustment, claiming the DEPB benefits did not qualify as a duty drawback adjustment under Commerce's two-pronged test that requires: (1) a sufficient link between the import duty and the rebate; and (2) a sufficient amount of raw materials imported and used in the production of the final exported product. *Decision Memorandum* at 3–4. Viraj responded that Commerce had appropriately adjusted the export price but that if the duty drawback adjustment were denied, Commerce should reduce the cost of raw materials used in the constructed value calculation. *Id.* at 5–6.

Commerce agreed with petitioners and decided not to adjust the export price for DEPB benefits received by Viraj. Commerce found a connection between the rebate and FOB price of the exported merchandise rather than a connection to the import duty paid, and that the Indian government arrived at the amount of drawback credit by using a pre-established determination of import content that failed to link the rebate to the import duties actually paid. *Id.* at 7. Commerce therefore concluded that Viraj had not established a link between the duties paid and rebate received. Because Viraj failed the first prong of the test, Commerce stated it was unnecessary to consider the second prong. *Id.* at 8.

Commerce also rejected Viraj's alternative claim that the cost of raw materials used in the calculation of constructed value should be reduced. Commerce did not reduce material costs because Viraj did not es-

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[8] Kumar & Garg, *Duty Entitlement Passbook Scheme*, (April 1998).

tablish that the duties offset by the DEPB benefits had ever been entered as a cost of materials in its books and records. Additionally, Viraj recorded the DEPB benefits in its financial statements as revenue rather than as an offset to an expense. Thus, Commerce found no connection between the revenue Viraj received and its raw material costs. *Id.* at 8.

A. *Parties' Contentions*

Plaintiff contends Commerce should increase the export price by the rebate amount of the DEPB credit because it has satisfied the conditions set forth in the relevant statute, 19 U.S.C. §1677a(c)(1)(B). Citing *Certain Welded Carbon Standard Steel Pipes and Tubes from India; Final Results of New Shippers Antidumping Duty Administrative Review,* 62 Fed. Reg. 47,632, 47,635 (Sept. 10, 1997) (*Pipes and Tubes from India*), Plaintiff also contends that when benefits from an intended duty drawback program are actually used to pay import duties on raw material used for exports, the duty drawback must be recognized in the dumping margin calculation.

Alternatively, Plaintiff contends Commerce should reduce Plaintiff's raw material costs based on its receipt of DEPB benefits. Plaintiff states it recorded the credit as revenue to offset the import duty expense that it claims to have included in the raw material cost in its books.

Finally, Plaintiff argues that during the review Commerce never raised concerns about Viraj's practice of recording the DEPB benefits as revenue. The lack of notice and opportunity to comment on this issue, Plaintiff contends, constitutes a due process violation.

Defendants counter that Commerce properly decided not to adjust the export price for DEPB benefits received because record evidence fully supports Commerce's finding that no link exists between the import duty and rebate. Defendants argue the Indian government's use of an assumed import content and a fixed percentage of the FOB value of exports does not link the rebate received to import duties actually paid. For support, Defendants claim Viraj submitted information to the Indian government regarding the quantity and value of the imported materials rather than the value of import duties paid. Moreover, Defendants state Viraj, as the interested party, had the burden to prove the amount and nature of the adjustment sought. *See* 19 C.F.R. § 351.401(b)(1) (2000).

Defendants distinguish *Pipes and Tubes from India* from the present case, as *Pipes and Tubes from India* involved an earlier drawback program. In addition, Defendants claim it could not apply because Viraj, by failing to meet Commerce's two-pronged test, did not use the DEPB system as a proper duty drawback program. Defendants state that *Stainless Steel Round Wire from India; Final Determination of Sales at Less Than Fair Value,* 64 Fed. Reg. 17,319 (April 9, 1999) *(Round Wire from India)* was more instructive for Commerce because in that case Commerce denied a duty drawback adjustment where the incentive credits were not based upon the amount of actual import duties paid.

Defendants next refute Viraj's alternative contention, claiming Commerce properly determined the DEPB benefits warranted no adjustment to cost of production or constructed value. Defendants state that cost of production and constructed value include "the cost of materials and [of] fabrication or other processing of any kind * * *." 19 U.S.C. § 1677b(b)(3)(A) and 19 U.S.C. § 1677b(e)(1). Defendants also state that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A). Defendants state Commerce did not find any import duties offset by DEPB benefits included in Viraj's books and records as a cost of materials. Instead, it found the DEPB benefits recorded as revenue rather than an offset to an expense, leading the agency to find no link between revenue received and the cost of purchasing raw materials. Defendant asserts that accepting Viraj's financial records, kept according to generally accepted accounting principles of the country of exportation, did not distort the company's true costs.

Finally, Defendants argue Viraj could have addressed this issue during the review because *Round Wire from India* was made a public record before the conclusion of this administrative review.

B. *DEPB Passbook Analysis*

i) *Commerce's decision not to increase Viraj's export price based on its receipt of benefits under the DEPB program is supported by substantial evidence and otherwise in accordance with law.*

The applicable statute, 19 U.S.C. § 1677a(c)(1)(B), provides that export price and constructed export price shall be increased by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States * * *." Commerce uses a two-prong test for determining whether the export price must be increased: (1) the import duty and rebate must be directly linked to, and dependent upon, one another; and (2) there must be sufficient imports of the imported raw materials to account for the drawback received on the exported product. This Court has upheld Commerce's test. *See Rajinder Pipes Ltd., v. United States,* 70 F. Supp. 2d 1350, 1358 (Ct. Int'l Trade 1999) (quoting *E.I. DuPont de Nemours & Co., Inc. v. United States,* 841 F. Supp. 1237, 1242 (Ct. Int'l Trade 1993)).

Substantial evidence supports Commerce's conclusion that Viraj failed to satisfy the first prong of the two-part test. As Viraj stated in its June 25, 1999 questionnaire response: "The amount of duty drawback we receive is [a] fixed percentage calculated by [the Indian] government to cover the cost of import duty on raw material. [F]or wire rod export we get 15% [of] the [FOB] value of export." *Supplemental Questionnaire Response* (June 25, 1999), at 5, Prop. Doc. 8, Def. Prop. App. 3 at 5. Sales Verification Exhibit 15 confirmed the drawback rate to be 15 percent of

the FOB for wire rods and billets. Def. Prop. App. 8 at 4. In addition, an August 8, 1998 bill of entry for raw materials showed the DEPB amount being debited from the customs duty to be 15 percent of the FOB value of the goods. *See Sales Verification Memorandum* (January 3, 2000), at 11, Prop. Doc. 19, Def. Prop. App. 7 at 11. Commerce correctly stated the record demonstrates only a link between the rebate and the FOB price of the exported merchandise, not between the duty paid and the duty drawback rebate as required. *Decision Memorandum* at 7. Reliance upon the Indian government's pre-determined import content for exported merchandise fails to link the rebate to duties actually paid on raw materials imported. *Id.*

Plaintiff misplaces its reliance upon *Pipes and Tubes from India*. In the program at issue in that review, the government of India reduced the amount of duties owed on future imports contingent upon the final exported merchandise incorporating "an amount of the input product equivalent to that which was previously imported" and an equivalent amount of duties being previously suspended. *Pipes and Tubes from India*, 62 Fed. Reg. at 47,635 (emphasis added). The program at issue here involves a "deemed" import duty that was not involved in *Pipes and Tubes from India.*

ii) *Commerce's decision to deny an adjustment to cost of production or constructed value is supported by substantial evidence and otherwise in accordance with law.*

Substantial evidence supports Commerce's denial of an adjustment to Plaintiff's cost of production or constructed value. Viraj did not establish that any import duties offset by the DEPB benefits were ever included in the company's books and records as a cost of materials. *Decision Memorandum* at 8. In addition, the DEPB benefits were recorded on Viraj's financial statements as revenue, not as an offset to an expense. *Id.* Nothing in the record supports Plaintiff's assertion that "[a]s the *Decision [Memorandum]* acknowledges, Viraj used the DEPB/Passbook benefits to pay import duties, such that no import duties are really paid on raw material imports." (Mem. in Supp. of Pl.'s Mot. for J. on the Agency R. at 10.) Neither is there support for Plaintiff's claim that "[t]he only reason DEPB/Passbook benefits could have been included as revenue in Viraj's books * * * was that the DEPB/Passbook benefits offset import duty expense included in the raw material cost in Viraj's books." *Id.*

To arrive at cost of production and constructed value, Commerce includes in its calculations "the cost of materials and [of] fabrication or other processing of any kind * * *." *See* 19 U.S.C. § 1677b(b)(3)(A) and 19 U.S.C. § 1677b(e)(1). In doing so, Commerce follows 19 U.S.C. §1677b(f)(1)(A), which states that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the

production and sale of the merchandise." Viraj's financial records are kept in accordance with the generally accepted accounting principles of India (*See Questionnaire Response* (August 30, 1999), at D–5, Def. Prop. App. 4 at D–5), and Viraj has raised no evidence that its books do not reasonably reflect the costs associated with the production and sale of the merchandise. By calculating costs based on Viraj's records, Commerce's decision not to reduce the raw material cost is in accordance with the statutory requirements above. No record evidence indicates any import duties offset by the DEPB benefits were ever included in the company's books and records as a cost of materials

Finally, Plaintiff has not persuaded this Court that it has been denied notice and opportunity to comment with respect to its practice of recording the DEPB benefits as revenue. Initially, Plaintiff did not provide sufficient evidence to Commerce of entitlement to a duty drawback adjustment to its export price. Although Commerce allowed for a duty drawback adjustment in the *Preliminary Results*, after considering petitioner's objections, it found Viraj did not qualify. Viraj had opportunity to rebut petitioner's objections. Because Commerce originally granted the export price adjustment, it was not until after the *Preliminary Results* that raw material price adjustment became an issue. Commerce had no reason to raise concerns earlier. Although the *Decision Memorandum*, as adopted by the *Final Results*, appears to rely upon *Round Wire from India,* it was not necessary for Viraj to have notice of Commerce's decision in *Round Wire from India* in order for its books to demonstrate the relationship between the benefit received and the cost of purchasing raw materials.

III. *Commerce's decision to use Viraj's inter-company transfer price to value steel billets for purposes of calculating constructed value is supported by substantial evidence and otherwise in accordance with law.*

As stated previously, because Viraj did not have any contemporaneous domestic or third-party sales during the period of review, Commerce was required to construct a normal value for subject merchandise. The antidumping laws provide that, with certain exceptions, constructed value shall include the cost of materials, fabrication or other processing, as well as an amount for selling, general and administrative expenses, and profit incurred in connection with the production and sale of a foreign like product or merchandise in the same general category of products as the subject merchandise for consumption in the foreign country. *See* 19 U.S.C. § 1677b(e)(1) and (2)(A) & (B) (1994). Commerce's regulations reflect the requirements of 19 U.S.C. § 1677b(e) and permit the agency to construct normal value "based on the cost of manufacture, selling general and administrative expenses, and profit." 19 C.F.R. § 351.405(a) (2000).

In the present case, Commerce calculated Plaintiff's cost of production based on its cost of materials and fabrication for the foreign like product, including the cost of the tolling operation performed by a third

party. *See Preliminary Results,* 65 Fed. Reg. at 1,599. Additionally, where necessary Commerce added an amount for third country selling, general and administrative expenses, and packing costs. *See id.* Commerce noted, however, that VIL, one of the three companies comprising the Viraj Group, had purchased the billets used in production of the subject merchandise from its affiliated company, VAL. *See id.* (citing Plaintiff's *Section D Questionnaire Response,* (August 30, 1999), at D4–D5, Prop. Doc. 13, Def. Prop. App. 4 at 5–6). Commerce further noted that because steel billets are a major input in the production of Plaintiff's subject merchandise, the major input rule should be applied to value the billets that VIL obtained from VAL. *See id.*

The major input rule provides that Commerce may value inputs obtained from affiliated parties at the highest of the transfer price, market price, or the cost of production. *See* 19 C.F.R. § 351.407(b). Accordingly, Commerce compared VAL's cost of production to the transfer price charged by VAL for the steel billets and determined that the transfer price exceeded the cost of production. Commerce also verified that the transfer price was identical to the market price. *See Preliminary Results,* 65 Fed. Reg. at 1,599 (citing *Memorandum to the File: Certain Stainless Steel Wire Rod from India-Antidumping Administrative Review 12/01/97 through 11/30/98—Verification of Viraj Impoexpo's ("VIL") and Viraj Alloys ("VAL") Cost of Production ("Cost Verification Report"),* at 8 (January 3, 2000)). Accordingly, Commerce valued steel billets at the transfer price for purposes of calculating constructed value.

A. *Parties' Contentions*

Plaintiff contends Commerce should have used the actual cost of production for billets as opposed to the transfer price between VIL and VAL. In support of its contention, Plaintiff argues that Commerce should have collapsed VIL and VAL for purposes of its investigation and, therefore, considered them to be one entity. Once VIL and VAL were properly established as a single entity, Plaintiff argues that the intercompany transfer price should be eliminated, thereby leaving only the cost of production as a viable value. Additionally, Plaintiff argues that the use of transfer price results in an impermissible double-counting of profit in the dumping margin calculation because in addition to the normal amount allowed for profit, the transfer price also contains a profit margin.

Defendants counter that Commerce's use of the transfer price for steel billet was supported by substantial evidence and otherwise in accordance with law. Citing 19 C.F.R. § 351.407(b), Defendants argue the major input rule permits Commerce to value inputs at the highest of the cost of production, market price or transfer price. Because VAL's transfer price exceeded VIL's cost of production and equaled the market price, Defendants argue Commerce's selection was reasonable. Additionally, Defendants argue that VAL and VIL were properly treated as separate entities for purposes of valuing steel billets. Defendants note

that Commerce may collapse companies only when specific regulatory requirements are satisfied and that, in the present case, such requirements were not met.

B. *Transfer Price Analysis*

Commerce properly valued steel billet at the inter-company transfer price as opposed to VAL's costs of production. Commerce's regulations do not constrain the agency's discretion in valuing the major inputs of subject merchandise. To the contrary, as this Court has consistently held, 19 C.F.R. § 351.407(b) provides Commerce may value such inputs at the highest of transfer price, market price or cost of production. *See SKF USA, Inc. v. United States*, 116 F. Supp. 2d 1257, 1267 (Ct. Int'l Trade 2000), *Mannesmannrohren-Werke AG v. United States*, 77 F. Supp. 2d 1302, 1310–12 (Ct. Int'l Trade 1999). Thus, although it is not required that Commerce select the highest of these three values, the decision to do so is left to the agency's discretion. *See SKF USA, Inc.*, 116 F. Supp. 2d at 1267.

In the present case, Plaintiff presents no evidence that would indicate Commerce abused its discretion in selecting the inter-company transfer price to value steel billet. Plaintiff does not challenge Commerce's finding that steel billet is a major input, nor does it assert that Commerce miscalculated the inter-company transfer price. Rather, Plaintiff asserts that the inter-company transfer price was inappropriate because VIL and VAL should have been collapsed and, therefore, treated as a single entity. Plaintiff fails, however, to demonstrate how VAL and VIL satisfy the collapsing requirements set forth in 19 C.F.R. § 351.401(f). Commerce may only "treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities" and the agency "concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1). Commerce determined that VAL produces steel billets and that VIL manufactures both stainless steel bright bar and stainless steel wire rod. *See Decision Memorandum* at 13. Commerce concluded that the production facilities necessary to manufacture these diverse products were sufficiently different as to require substantial retooling of either facility in order to restructure manufacturing priorities. *See id.* Because Viraj failed to meet the first collapsing requirement of 19 C.F.R. § 351.401(f)(1), Commerce stated the issue of price manipulation was moot. *See id.* at 13–14. As Plaintiff was unable to comply with the requirements for collapsing set forth in 19 C.F.R. § 351.401(f), this Court will not disturb the conclusions of Commerce. Accordingly, this Court finds that Commerce properly chose not to collapse VAL and VIL for purposes of calculating the value of steel billet.

Plaintiff additionally argues that, by using the inter-company transfer price, Commerce impermissibly included the profit built into that price in its constructed value calculation. Plaintiff supports its argu-

ment by citing to *Notice of Final Determination of Sales at Less than Fair Value: Live Cattle From Canada,* 64 Fed. Reg. 56,739, 56,748 (October 21, 1999) *(Live Cattle),* which stated:

> [I]t is proper, when reporting sales and cost data, to eliminate inter-company transactions between companies that the Department is treating as a single entity * * * [I]t would be illogical to include inter-company profits in the actual cost of production of the group.

See also Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Wire Rod from Korea, 63 Fed. Reg. 40,404, 40,421 (July 29, 1998) *(Wire Rod).* Plaintiff's argument and its reliance upon its cited precedent are misplaced. In both *Live Cattle* and *Wire Rod,* Commerce concluded that the requirements of 19 C.F.R. § 351.401(f) were satisfied, thereby permitting the agency to treat the several companies as a single entity. The validity of Plaintiff's argument, therefore, depends upon the collapsing of VAL and VIL, and the Court has already found that Commerce properly chose not to treat the two companies as a single entity. Unlike the relationships in *Live Cattle* and *Wire Rod*, the business relationship between VAL and VIL appears to be limited to that of manufacturer and supplier despite their affiliated status. As Commerce noted in *Live Cattle,* 64 Fed. Reg. at 56,748, the "major input rule[] appl[ies] to transactions between the respondent [manufacturer] and an affiliated raw material supplier or service provider." Thus, because the transaction between VAL and VIL is analogous to a sale between manufacturer and supplier, Commerce properly incorporated any profit margin built into VAL's transfer price into Viraj's cost of production. This Court is therefore persuaded that Commerce properly valued steel billet and did not double count profit in violation of the antidumping laws. Accordingly, Commerce's use of the inter-company transfer price is sustained.

CONCLUSION

Upon Plaintiff's challenge to Commerce's currency conversion methodology in the *Final Results,* the Court remands this case to Commerce to explain why it did not take into account the devaluation of the rupee against the dollar to obtain the most accurate dumping margin possible and, should it be necessary, to recalculate such margin as may be required. In all other respects the determination of Commerce is sustained.

(Slip Op. 01–105)

AMERICAN SHIP MANAGEMENT, LLC, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SL SERVICE, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 99–03–00151

Plaintiffs, American Ship Management, LLC and SL Service, Inc., move for summary judgment pursuant to R. 12(c) of the Rules of the United States Court of International Trade alleging that the undisputed material facts in the case show that United States Customs Service misapplied 19 U.S.C. § 1466, as interpreted by *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539 (Fed. Cir. 1994), by assessing duties on the plaintiffs' dry-docking expenses on a pro-rata basis. Customs has filed a cross-motion for summary judgment contending that Customs acted legally by apportioning the dry-docking expenses on a pro-rata basis in a fashion mimicking the methodology used by Customs for apportionment of expenses between dutiable and non-dutiable foreign work.

Held: For the reasons stated below, the plaintiffs' motion and Customs' cross-motion are denied on the ground that there remain triable issues of fact.

[The plaintiffs' motion and Customs' cross-motion are denied. The parties are to proceed with the litigation on merits.]

(Dated August 17, 2001)

Garvey, Schubert & Barer (Charles Routh) for plaintiff American Ship Management, LLC.

Sonnenschein Nath & Rosenthal (Evelyn M. Suarez and *Alexander H. Schaefer)* and *Robert S. Zuckerman*, General Counsel, for plaintiff SL Service, Inc.

Stuart E. Schiffer, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara M. Epstein)*; of counsel: *Karen P. Binder*, Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendant.

Collier Shannon Scott, PLLC (Lauren R. Howard) for Shipbuilders Council of America, Inc., amicus curiae in support of defendant's cross-motion for summary judgment.

MEMORANDUM OPINION AND ORDER

TSOUCALAS, *Senior Judge:* Plaintiffs, American Ship Management, LLC and SL Service, Inc. ("plaintiffs"), pursuant to R. 12(c) of the Rules of the United States Court of International Trade, move for summary judgment alleging that the undisputed material facts in the case show that, as a matter of law, United States Customs Service ("Customs") misapplied and misinterpreted the vessel repair statute, 19 U.S.C. § 1466 (1994), by assessing duties on the plaintiffs' dry-docking expenses on a pro-rata basis irrespective of the inspection required by the United States Coast Guard and American Bureau of Shipping and performed during the dry-docking. Customs has filed a cross-motion for summary judgment contending that Customs acted legally by apportioning the dry-docking expenses incurred by the plaintiffs in a fashion mimicking the methodology used by Customs for apportionment of expenses between dutiable and non-dutiable foreign work. For the reasons stated below, the plaintiffs' motion and Customs' cross-motion are denied on the ground that there remain triable issues of fact.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (1994).

DISCUSSION

I. *Undisputed Facts*

The case concerns dry-docking duties imposed by Customs on two vessels, specifically, M/V President Truman, a vessel belonging to American Ship Management, LLC, and Sea-Land Pacific, a vessel belonging to SL Service, Inc. M/V President Truman underwent dry-docking at the Hongkong United Dockyard Ltd., and Sea-Land Pacific was dry-docked in the Hyundai Mipo Dockyard. Both vessels were put into their scheduled dry-docks to comply with mandatory United States Coast Guard and American Bureau of Shipping regulations requiring certain inspections and modifications. During the dry-docking, the vessels, in addition to the mandatory inspections, underwent non-dutiable modifications as well as dutiable repairs. The dry-docking and general service expenses incurred by the vessels were apportioned by Customs in the following manner: (1) the expenses for dutiable repairs were added to the expenses for non-dutiable modifications and inspection; (2) the percentage of this total was calculated representing the expenses ensuing from the dutiable repairs; and (3) the same percentage of the total dry-docking expenses incurred by each vessel was deemed to be a dutiable expense. *See* Def.'s Mem. Law Opp'n Pl.s' Mot. Summ. J. Supp Def.'s Cross-Mot. Summ. J. ("Def.'s Mem.") at 22.

II. *Contentions of the Parties*

The plaintiffs assert that the liquidation of dry-docking expenses as dutiable is illegal, even on a pro-rata basis, in view of the following: (1) the fact that the vessels were undergoing a mandatory inspection; and (2) the test posed by *Texaco Marine Servs., Inc. v. United States ("Texaco")*, 44 F.3d 1539 (Fed. Cir. 1994) prohibits the imposition of duties on the dry-docking undetaken for "mixed purpose." *See* Pl.s' Joint Mem. Law Supp. Mot. Summ. J. ("Pl.s' Mem.") at 2. The plaintiffs also contend that any imposition of duties on a pro-rata basis is per se illegal under the *Texaco* test. *See id.*

Customs maintains that where dry-docking expenses were incurred for more than one purpose, e.g., both dutiable repairs and a mandatory inspection, such "mixed-purpose" expenses are subject to the imposition of apportioned duties. *See* Def.'s Mem. at 7.

IV. *Analysis*

A. *Statutory Background and the Texaco Test*

Section 1466(a) of United States Code, Title 19, provides that

> [t]he equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the *expenses of repairs* made in a foreign country upon a vessel documented under the laws of the United States * * * shall * * * be liable to entry and the payment of an ad valorem duty * * * on the cost thereof in such foreign country.

19 U.S.C. § 1466(a) (emphasis supplied).

The case at bar involves the interpretation of the term "expenses of repairs" used in 19 U.S.C. § 1466(a). Prior to the Federal Circuit decision in *Texaco*, 44 F.3d 1539, Customs used a restrictive interpretation of the term. For example, Customs did not treat the dry-docking as an "expense of repairs" making dry-docking expenses non-dutiable. *See Texaco*, 44 F.3d 1539. Customs' pre-*Texaco* treatment was based upon the premise that dry-docking expenses were not "part of" and/or "directly involved" in a dutiable repair. *See id.*

The court in *Texaco* examined the statutory language, determined the language to be clear and unambiguous, and concluded that it is proper to

> interpret [the term] "expenses of repairs" as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. Conversely, [the term] "expenses of repairs" does not cover expenses that would have been incurred even without the occurrence of dutiable repair work. [In sum,] the "but for" interpretation accords with what is commonly understood to be an expense of a repair.

Texaco, 44 F.3d at 1544 (citations omitted).

The court in *Texaco* also specified that

> [t]he mere drawing up of a vessel on a dry dock is not a part of her repairs, but is rather a method of making an inspection of her to determine whether any repairs are necessary. The examination might show the hull to be in perfect condition, requiring no attention of any kind.

Id. at 1546 (citing *United States v. George Hall Coal Co.*, 142 F. 1039 (2d Cir. 1906).

In light of *Texaco*, 44 F.3d 1539, Customs started assessing duty on the dry-docking expenses which would not have been incurred "but for" dutiable repairs even if the expenses were not "part of" and/or "directly involved" in the repair itself. *See* Def.'s Mem. at 7.

B. *Apportionment Under the Texaco Test*

The plaintiffs assert that any imposition of duties on dry-docking expenses on a pro-rata basis is per se illegal under the *Texaco* test. *See* Pl.s' Mem. at 2. The plaintiffs point out that "the Federal Circuit has specifically ruled" that "'mixed purpose' dry-docking * * * do[es] not qualify as 'expenses of repairs.'" *Id.* While the Court agrees with the plaintiffs' reading of *Texaco* with regard to "mixed purpose" dry-docking expenses, the Court disagrees with the plaintiffs' unreasonable expansion of the *Texaco* holding.

In essence, the court in *Texaco* delineated two categories of expenses under 19 U.S.C. § 1466(a), specifically: (1) dutiable expenses that would not be undertaken "but for" the need to repair; and (2) non-dutiable expenses undertaken for a purpose either unrelated to repair or for a "mixed purpose" related to a dutiable repair as well as to a non-dutiable activity, e.g., an inspection or modification. The *Texaco* classification, however, does not make an apportionment of dry-docking expenses per se illegal if there is a clear identification of the dutiable dry-docking ex-

penses undertaken solely for the purpose of repair and the non-dutiable dry-docking expenses undertaken for a purpose either unrelated to repair or for a "mixed purpose." *See generally, Texaco,* 44 F.3d 1539. Therefore, the Court holds that Customs correctly concluded that it could apportion dry-docking expenses under the mandate of 19 U.S.C. § 1466(a), as clarified by *Texaco,* 44 F.3d 1539.

C. *Pro-Rata Apportionment Used by Customs*

In the case at bar, the dutiable and non-dutiable dry-docking expenses were apportioned by Customs according to the percentage corresponding to the value of dutiable repairs and non-dutiable expenses incurred by each vessel. *See* Def.'s Mem. at 22. While the general concept of apportionment of dry-docking expenses does not contradict the holding of *Texaco,* 44 F.3d 1539, *see supra,* the particular apportionment used by Customs was arbitrary, capricious and in violation of the classification designated by *Texaco,* 44 F.3d 1539.

Dry-docking expenses include, among other things, maintenance expenses and the cost of tugs to put the vessel into and out of dry dock.[1] *See, e.g., Dahlia Maritime Co. v. M/S Nordic Challenger,* 1993 U.S. Dist. LEXIS 10170 (E.D. La. 1993). Consequently, the cost of tugs is an inevitable expense of a mandatory inspection and, thus, is non-dutiable. *See Texaco,* 44 F.3d 1539. Similarly, all maintenance charges (along with all other charges related to the maintenance)[2] associated with the dry-docking during the period of mandatory inspection and/or modifications are non-dutiable expenses under the test posed by *Texaco* notwithstanding whether or not the vessel undergoes any repair during this period. *See id.* Therefore, only the maintenance expense of dry-docking for the period of time in excess of that necessary for a mandatory inspection and/or modifications are dutiable under the *Texaco* test. *See id.*

While, under an unlikely scenario, such calculation may create a result accidently corresponding to that reached by Customs in the given case, this possibility is irrelevant to the validity of Customs' method of calculation because the method violates, as a matter of law, the test offered by *Texaco,* 44 F.3d 1539. Customs shall obtain from the plaintiffs the information necessary to make a calculation supported by logic rather than random guessing.[3]

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[1] The latter usually comprises the main expense of the dry-docking process.

[2] The term "maintenance" in the context of dry-docking usually associates with utilities and analogous services, the related charges could include, for example, the procedures and tools necessary to bring and keep the vessel in a stable position.

[3] Customs asserts that the plaintiffs failed to satisfy the plaintiffs' "burden" because, according to Customs, there is no pertinent information in the plaintiffs' brief. This Court presumes that Customs was referring to the term "burden of production." The term "burden of production" defines the burden on one party to introduce sufficient evidence to avoid judgment against that party as a matter of law. Specifically, the plaintiff shall go forward with the evidence on the issue, thus, shifting the burden to the defendant to produce evidence showing otherwise. *See, e.g., Environmental Defense Fund, Inc. v. EPA,* 548 F.2d 998, 1013 (D.C. Cir. 1976) (noting that the burden of production does not necessarily lay with the same party carrying the burden of persuasion). In the case at bar, the plaintiffs provided a series of affidavits stating that "the dry-docking expenses would have been incurred regardless of whether or not any repair work took place." *See* Pl.s' Mem., Ex. 1. Consequently, the plaintiffs came forward with the evidence sufficient to shift the burden to Customs to show otherwise and justify the apportionment method used by Customs.

V. CONCLUSION

This Court finds that there are genuine issues of material fact as to what dry-docking maintenance charges (along with all other charges related to the maintenance) were undertaken by the plaintiffs during the dry-docking in excess of that necessary for the mandatory inspections and/or modifications. Because triable issues of fact remain, the plaintiffs' motion and Customs' cross-motion for summary judgment are denied, and it is hereby

ORDERED that parties proceed with the litigation on merits.

(Slip Op. 01–106)

RHP BEARINGS LTD., NSK BEARINGS EUROPE LTD., NSK CORP., BARDEN CORP. (U.K.) LTD., BARDEN CORP., AND FAG BEARINGS CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Consolidated Court No. 97–11–01983

(Dated August 20, 2001)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *RHP Bearings Ltd. v. United States*, 25 CIT ____, Slip Op. 01–18 (Feb. 23, 2001) ("Remand Results"), and Commerce having complied with the Court's remand, it is hereby

ORDERED that the Remand Results filed by Commerce on May 18, 2001, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 01–107)

FAG KUGELFISCHER GEORG SCHAFER AG, FAG BEARINGS CORP., SKF USA INC., SKF GMBH, NTN BEARING CORP. OF AMERICA, NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, INA WALZLAGER SCHAEFFLER KG, AND INA BEARING CO., INC., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–02–00260

(Dated August 20, 2001)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT ___, Slip Op. 01–13 (Feb. 2, 2001) ("Remand Results"), and Commerce having complied with the Court's remand, it is hereby

ORDERED that the Remand Results filed by Commerce on May 2, 2001, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 01–108)

FAG ITALIA, S.P.A., FAG BEARINGS CORP, SKF USA INC., AND SKF INDUSTRIE S.P.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–02–00260–S

(Dated August 20, 2001)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *FAG Italia, S.p.A. v. United States*, 24 CIT ___, Slip Op. 00–154 (Nov. 21, 2000) ("Remand Results"), and Commerce having complied with the Court's remand, it is hereby

ORDERED that the Remand Results filed by Commerce on April 23, 2001, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

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